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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 711

H. J. GORMAN, CITY TREASURER OF KANSAS CITY, MISSOURI, AND FRANK McCABE, CITY ASSESSOR OF KANSAS CITY, MISSOURI, PETITIONERS,

vs.

THE WASHINGTON UNIVERSITY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

PETITION FOR CERTIORARI FILED OCTOBER 22, 1941.

CERTIORARI GRANTED NOVEMBER 24, 1941.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

No. 436537

THE WASHINGTON UNIVERSITY, a Corporation, Plaintiff,

vs.

H. F. GORMAN, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, Defendants

JUDGMENT—February 24, 1940

On the 26th day of January, 1940, this cause came on regularly for hearing and the parties appearing by proper representatives and by their respective attorneys, and the [fol. b] cause was submitted to the Court upon the pleadings and evidence adduced and by the Court taken under advisement. Now on this 24th day of February, 1940, the Court being fully advised in the premises, doth find all the issues herein in favor of plaintiff and against defendants.

It Is, Therefore, Ordered, Adjudged and Decreed as follows:

That the parcels of property, and each of them, described in plaintiff's petition as owned by plaintiff, viz:

All of Lots six (6) and seven (7), Block two (2), Ashburn's Addition to the City of Kansas, now Kansas City, Missouri, according to the recorded plat thereof.

All of Lot three hundred thirteen (313) (except part thereof in Main Street) in Block twenty-four (24), McGee's Addition to the City of Kansas, now Kansas City, Missouri, according to the recorded plat thereof, being a tract or parcel of land fronting 49 feet 6 inches on the east line of Main Street by a depth eastwardly between parallel lines and along the north line of East Seventeenth Street, 113 feet 6 inches to an alley.

All of Lot ten (10) in Block six (6), McDaniel's Addition an addition in Kansas City, Jackson County, Missouri; were and are under the Acts of the General Assembly of the State

of Missouri incorporating plaintiff and constituting its charter, exempt from taxation.

That by reason of said charter exemption the assessment and levy taxes upon the said property and the issuance of tax bills against the same were and are contrary to law and void.

That tax bills made out and issued for taxes against said property and any parcels thereof for 1933 and subsequent years were and are unauthorized by law and void, and that the said tax bills, and each of them, and any reissues or renewals thereof ought to be and are hereby ordered cancelled.

That the temporary injunction heretofore issued by this Court on November 20, 1934 be made permanent, and that defendant Frank McCabe as Assessor of Kansas City, Missouri, his deputies, agents and servants be forever enjoined and restrained from assessing any general city taxes against any of plaintiffs' said property, and that the defendant [fol. c] H. E. Gorman, as City Treasurer of Kansas City, Missouri, his deputies, agents and servants be and they are hereby forever enjoined and restrained from in any manner collecting or enforcing or attempting to collect or enforce the payment of any of said tax bills, or any renewals or reissues thereof, and from seizing, offering for sale or selling plaintiff's said property, or any part thereof, for the enforcement or collection of any of said tax bills or any renewals or reissues thereof.

And that plaintiff have and recover of the defendants its costs herein.

IN CIRCUIT COURT OF JACKSON COUNTY

[Title omitted]

ORDER ALLOWING APPEAL—May 4, 1940

Now on this day defendant files and presents affidavit for appeal, and appeal is allowed to the Supreme Court. Defendant is given the time allowed by law for filing bill of exceptions.

Clerk's Certificate to foregoing papers omitted in printing.

[fol. 1] IN SUPREME COURT OF MISSOURI, SEPTEMBER TERM, 1940

No. 37435

THE WASHINGTON UNIVERSITY, Respondent,

vs.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, Appellants

Appeal From the Circuit Court of Jackson County

Honorable Paul A. Buzard, Judge

Appellants' Abstract of the Record—Filed February 24, 1940

RECORD PROPER

This suit was commenced in the Circuit Court of Jackson County on the 19th day of November, 1934 by filing a petition in the office of the Clerk of said Court. A summons was duly issued and due service upon Maurice Carey, the then City Treasurer, was had (said petition) omitted here [fol. 2] because ease was thereafter tried on amended petition wherein H. J. Gorman was substituted for Maurice Carey, deceased, as City Treasurer and Frank McCabe, City Assessor, was made a new and additional party to this suit.

Thereafter and on the 20th day of November, 1934, a temporary injunction issued against Maurice Carey, the then City Treasurer, restraining him from selling the real estate in question at tax sale until the further order of Court. The said Maurice Carey, City Treasurer, being the only party defendant at that date.

Thereafter and on the 26th day of January, 1935, defendant Maurice Carey, City Treasurer, filed his demurrer to plaintiff's petition.

Whereupon, thereafter and on the 26th day of January, 1938, by leave of Court, plaintiff filed amended petition making Frank McCabe, City Assessor of Kansas City, a new and additional party and alias summons was issued thereon

and duly served upon said Frank McCabe, City Assessor, on the 27th day of January, 1938.

Thereafter and on the 2nd day of June, 1938 defendants filed answer to amended petition.

Thereafter and on the 26th day of January, 1940, by agreement of parties and by leave of Court, plaintiff amended its petition by making H. J. Gorman, City Treas- [fol. 3] urer of Kansas City, Missouri, a party defendant instead of and for Maurice Carey, deceased. This cause was heard upon said petition as amended, which is as follows:

AMENDED PETITION

Count I

1. Plaintiff for its amended petition filed by leave of Court states that it is a corporation duly organized and existing under the Acts of the General Assembly of the State of Missouri, viz:

That the said General Assembly of the State of Missouri, incorporated the "Eliot Seminary", by an Act entitled "An Act to Incorporate the Eliot Seminary", approved February 22, 1853, which said Act was and is in the words and figures following:

"Be it enacted by the General Assembly of the State of Missouri as follows:

"Section 1. Christopher Rhodes, Samuel Treat, John M. Krum, John Cavender, George Partridge, Phocion R. McCreery, George Pegram, N. J. Eaton, James Smith, Seth A. Roulett, Mann Butler, William C. Elliott, Jr., John How, Hudson E. Bridge, William Glasgow, Jr., Samuel Russell and Wayman Crow and their associates and successors are hereby constituted a body corporate and politic by the name of 'The Eliot Seminary' and by that name shall have perpetual succession and be capable of taking and holding by gift, grant, devise or otherwise, and conveying, leasing or other- [fol. 4] wise disposing of any estate, real, personal or mixed, annuities, endowments, franchises, and other hereditaments which may conduce to the support of said Seminary, or to the promotion of its objects; all property of said corporation shall be exempt from taxation and the sixth, seventh and eighth sections of the first Articles of the Act concerning corporations, approved March 19th, 1845, shall not apply to this corporation.

"Section 2. The management of the affairs of this corporation shall be vested in a board of seventeen directors; the persons herein named shall constitute the first board of directors. Vacancies occurring in the Board by resignation, death or otherwise, shall be filled by the Board.

"Section 3. The board of directors shall prescribe the course of instruction in said Seminary and organize the institution under such regulations and provide in such way as they may deem proper for the appointment of its professors, teachers and other officers, and may make such by-laws and rules as they may deem necessary for the management of the institution.

"Section 4. This act shall take effect upon its passage.

"Approved February 22, 1853."

That under the said Act, the parties named therein, without delay, proceeded to organize the said "Eliot Seminary", as a seminary and institution of learning, as by said Act provided; that the said "Eliot Seminary" immediately [fol. 6] was organized, and immediately became and was an existing corporation, under its said corporate name, and by its said name acquired and held property as such, and in all respects undertook to carry out, and did carry out, the purposes, and exercised and enjoyed the rights and franchises, by said Act provided and intended.

2. That afterwards the said Act of the said General Assembly of Missouri (by and under which the said corporation was organized) was amended, by an amendatory act entitled "an Act to Amend an Act entitled 'an Act to Incorporate the Eliot Seminary', approved February 12, 1857", which said amendatory act was and is in words and figures as follows, to-wit:

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. The name of the corporation known as 'The Eliot Seminary' shall henceforth be 'The Washington University', by which name the said corporation shall have, hold and enjoy all the property, rights, franchises, endowments, immunities and privileges conferred upon and belonging to The Eliot Seminary.

"Section 2. No instruction either sectarian in religion or party in politics shall be allowed in any department of said University, and no sectarian or party test shall be allowed in the election of professors, teachers, or other officers of said University, or in the admission of scholars thereto or for any purpose whatsoever.

[fol. 6] "Section 3. It shall be the duty of the Board of Directors of said University upon being informed to any violation of the second section of this act forthwith to institute an enquiry into the charge or charges that may be preferred in respect thereof by any credible person in writing against any officer of said University; and if it shall appear that any officer of said University has violated the said second section of this act, the Board of Directors shall forthwith remove such person so offending from any office which he may then fill in any department of said University, and such person so removed shall be forever thereafter ineligible to any office in said University.

"Section 4. In case the Board of Directors upon being notified in writing by any credible person of a violation of the second section of this Act, shall refuse or neglect to investigate the charge thereupon preferred against any officer of said University, it shall be competent for the St. Louis Circuit Court, or the St. Louis Court of Common Pleas, to compel the Board of Directors by mandamus, to perform their duty in investigating such charge, and to show their performance of such duty to the satisfaction of the Court having cognizance of the matter, and all proceedings under this section shall be summary, and conducted to a conclusion with as little delay as possible; and the power hereby given to the said courts may be exercised by the judge of either of said tribunals in vacation.

"Section 5. Whereas the said Eliot Seminary has purchased for the purpose of erecting thereon university build-
[fol. 7] ings, a tract of land within the present corporate limits of the City of St. Louis, containing about three 40/1000 acres of land, bounded on the East by an alley, on the West by Beaumont Street, on the South by Locust Street, and on the North by Washington Avenue. And Whereas said tract of land, before being conveyed to the said corporation was described and designated in a plat filed in the Office of the Recorder of Deeds of St. Louis County.

as a part of an addition to the City of St. Louis, and certain streets and alleys were marked and shown on said plat as traversing said tract, but were never actually opened and laid out on the ground through said tract; and whereas, it is desirable that the buildings proposed, the said University, should cover a larger portion of said tract, and that the whole thereof should be within one enclosure and secure from interruption or disturbance; therefore, it is enacted, that all streets and alleys existing in contemplation of law, through, over or upon the said tract of land so acquired by said corporation as aforesaid, shall be and the same are hereby vacated and abolished; and it shall not be lawful for the City of St. Louis or the County of St. Louis to open any road, street, alley or avenue through or over said tract or any part thereof so long as it shall remain the property of said corporation without the consent of the Board of Directors of said University expressed by resolution formally entered upon the minutes of the their proceedings.

"This act shall be in force from and after its passage.

"Approved February 12, 1857."

[fol. 8] That the last mentioned amendatory act was immediately and duly accepted by said Eliot Seminary as an amendment to the charter thereof then previously in force, and that said new corporate name of said "The Washington University" was immediately adopted, and ever since has been and now is used by and constitutes the proper name of the plaintiff corporation.

3. That since its creation by the original act of the General Assembly of the State of Missouri above set forth, plaintiff has constantly been actively engaged and employed in the legitimate prosecution of the purposes of its incorporation in and under its said charter heretofore set forth. That it has erected, built up, and established in the City of St. Louis and partly in said City of St. Louis and County of St. Louis, and has ever maintained and now maintains, schools of a high order for the education of the young of both sexes, largely attended, both by night and by day, including professional schools and a wide range of university extension courses for the benefit of those unable to attend the regular classes or curriculum of the plaintiff, at an annual expense to plaintiff of approximately two million three hundred thousand dollars ($2,300,000.00); that such

annual expenditure is far in excess of any income derived, or that could be derived, by the plaintiff from the fees paid [fol. 9] it, and that its total income from its schools is not in excess of approximately one million, two hundred thousand dollars ($1,200,000.00).

4. That various persons, institutions and foundations, in reliance upon and in consideration of the provisions of said acts of incorporation hereinabove set forth, and the exemption from taxation thereby conferred, have devised, bequeathed, conveyed, given and granted large amounts of money and property to this plaintiff, in aid of its purposes; that by such devises, bequests, conveyances, gifts and grants, or from the proceeds thereof, this plaintiff has acquired a large amount of property, real as well as personal, in the City of Kansas City, and elsewhere, and now owns and administers the same.

That all the profit, income and revenue from the said property is being devoted and has ever been devoted to and is necessary for the maintenance of its said schools, the payment of its professors and instructors, now numbering in all approximately 765, the erection and maintenance of buildings and other equipment necessary for the efficient conduct of its said schools and the teaching and training of its students.

That among the said properties so acquired and owned by plaintiff, and all the profit, income and revenue whereof has been and is being devoted as aforesaid, are those located in the City of Kansas City, Missouri, and described as follows:

[fol. 10] All of Lots six (6) and seven (7), Block two (2) Ashburn's Addition to the City of Kansas, now Kansas City, Missouri, according to the recorded plat thereof.

All of Lot three hundred thirteen (313) (except part thereof in Main Street) in Block twenty-four (24), McGee's Addition to the City of Kansas, now Kansas City, Missouri, according to the recorded plat thereof, being a tract or parcel of land fronting 49 feet 6 inches on the east line of Main Street by a depth eastwardly between parallel lines and along the north line of East Seventeenth Street, 113 feet 6 inches to an alley.

All of an undivided one-half interest in Lot ten (10) in Block six (6), McDaniel's Addition, an addition in Kansas City, Jackson County, Missouri.

That all of said properties were owned by the plaintiff on and prior to January 1, 1933, and at the time the taxes hereinafter complained of were assessed, and ever since have been and now are owned, by plaintiff; that by virtue of the contract of the State of Missouri, set forth and contained in plaintiff's charter, and accepted and long relied and acted upon by plaintiff and others the said properties, and each and every part and parcel thereof, are and ever have been, exempt from all taxation.

That by reason of the said statutes and the said contract, which constitute and ever have been laws of the State of [fol. 11] Missouri, the said property and each and every item and parcel thereof, have been segregated and set apart from the realm of taxable property, and are and ever have been beyond the power and jurisdiction, for purposes of taxation, of any assessors, boards or officers of the State of Missouri and/or of the City of Kansas City, and any attempt on their part or on the part of any of them, to assess taxes upon or collect the same from said property, or any item or parcel thereof, is and ever has been utterly without jurisdiction and void.

5. That on October 30, 1875, the people of the State of Missouri adopted a new Constitution, which went into effect on November 30, 1875, which Constitution became and was made by such vote of adoption and has ever since remained the supreme law of the State of Missouri, subject only to the Constitution of the United States; that by Sections 6 and 7 of Article X of the said Constitution, it was and is provided, as follows:

"Sec. 6. Property exempt from taxation.—The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for purposes purely charitable; also, [fol. 12] such property, real or personal, as may be used exclusively for agricultural or horticultural societies; Provided, That such exemption shall be only by general law.

"Sec. 7. Other exemptions void.—All laws exempting property from taxation, other than the property above enumerated, shall be void."

That as applied to this plaintiff and its property, the said constitutional provisions and the said laws of the State of Missouri thereby undertaken to be expressed are null and void, as being contrary to and in violation of Section 10 of Article I of the Constitution of the United States, which provides, among other things, that no state shall pass any law impairing the obligation of contracts.

That by Sections 9742-43, of the Revised Statutes of Missouri 1929, it is and has been provided ever since the year 1879 as follows:

"Sec. 9742. Property taxable for state purposes.—For the support of the government of the state, the payment of the public debt and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section.

"Sec. 9743. Exemptions therefrom.—The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and [fol. 13] equipments, belonging to the United States; third, lands and other property belonging to this state; fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls, and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; fifth, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of education, until disposed of to individuals by sale or lease; sixth, lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the *the* extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, shall be exempted from taxation for state, county or local purposes."

That as applied to this plaintiff and its property, the said Sections 9742-43, of the Revised Statutes of Missouri,

1929, above set forth, are null and void, as being contrary to and in violation of said Section 10 of Article I of the Constitution of the United States, which provides, among other things, that no state shall pass any law impairing the obligation of contracts.

6. That the defendant H. J. Gorman is the duly appointed, qualified and acting Treasurer of Kansas City, Missouri, and is the officer authorized and directed by the Charter and Ordinances of such city to collect delinquent city taxes [fol. 14] by sale of the real estate upon which such taxes are levied, and is now engaged in discharging his duties as such Treasurer in the collection of general city taxes in Kansas City, Missouri.

That the defendant Frank McCabe is the duly appointed, qualified and acting Assessor of Kansas City, Missouri, and is the officer authorized and directed by the Charter of such City to assess city taxes on real estate in Kansas City, Missouri, and certify the amount of such taxes to the City Treasurer of Kansas City, and is now engaged in discharging his duties as such Assessor in the assessment of general city taxes in Kansas City, Missouri.

7. That notwithstanding plaintiff's exemption from taxation so contracted for by the Acts of the General Assembly constituting plaintiff's charter and accepted and relied upon by plaintiff and its donors, defendant Frank McCabe as the Assessor of Kansas City, Missouri, acting and professing to act under said sections of the Missouri Constitution above set forth and under said Statutes of the State of Missouri and under the Charter and Ordinances of Kansas City, Missouri has illegally and without any right or jurisdiction, attempted to assess for taxation as against this plaintiff and has assessed as against this plaintiff, the real estate hereinabove described as being owned by plaintiff and pursuant thereto and acting and [fol. 15] professing to act under like authority, defendant H. J. Gorman as Treasurer of Kansas City, Missouri, has demanded of plaintiff payment of general city taxes as follows:

Undivided ½ Int. Lot 10, Block 6, McDaniel's Addition 1933 taxes $23.71

amounting in the aggregate to $23.71. A copy of such tax bill marked Exhibit A is attached hereto and made a part

hereof. Said defendant has advertised the said property for sale for nonpayment of such taxes, as provided by law, and has sold or is about to sell the same, and unless enjoined and restrained by decree of this Court, will proceed to enforce payment of said taxes against and out of the property of the plaintiff and sell the same and issue assignable certificates of purchase to purchaser thereof, all to plaintiff's great and irreparable damages.

8. That the said tax bills, tax sales and certificates of purchase constitute clouds and encumbrances on plaintiff's title and plaintiff is unable to sell or convert into money any of its said real property without paying the said tax bills, although plaintiff's situation renders it necessary and expedient that some of such property be sold for the purpose of raising money for the conduct and maintenance of its schools.

That said tax bills and certificates of purchase, if issued, [fol. 16] will continue to constitute, unless cancelled, such cloud and encumbrance, and said defendants will continue to assess and endeavor to collect such taxes unless restrained, and that plaintiff has no adequate remedy at law.

9. That in the year 1865, and after the enactment and acceptance of plaintiff's charter, as aforesaid, and after the amendment and the acceptance of the amendment thereof, the State of Missouri undertook to adopt and enact, and did adopt and enact a new Constitution, constituting the supreme law of said state, subject to the Federal Constitution; which supreme law provided that no property, real or personal, should be exempt from taxation except such as may be used exclusively for public schools and such as may belong to the United States, to the State of Missouri, and to counties, and to municipal corporations of the State; and it prohibited the Legislature from entering into any contract exempting the property of an individual from taxation.

Thereupon, the General Assembly of the State of Missouri at once provided for the taxation of all property belonging to eleemosynary corporations, and not included within said constitutional exemptions of 1865.

That pursuant to the said constitutional provisions and to the said statutes, the officers of St. Louis County (of which the City of St. Louis then formed a part) were as- [fol. 17] serting the right, and were proceeding under the

new constitutional and statutory provisions aforesaid, to undertake to assess and collect taxes upon the property of this plaintiff.

That in the year 1866, one Edward S. Rowse was the duly elected, qualified and acting Collector of the Revenue of St. Louis County, Missouri, of which County the City of St. Louis then formed a part, and within which County said City was then contained; that in said year, the officers of the said County of St. Louis, then authorized by law to assess property in said County for state, county and school taxes, proceeded to assess state, county and school taxes for the year 1866 against sundry parcels of land and improvements thereon situated in the said County of St. Louis which were owned by the plaintiff herein, and which had been the property of the plaintiff herein at and before the time of such assessment; that bills for such taxes so assessed for the year 1866 were made out by the officers of said County of St. Louis authorized to make out tax bills, and were delivered to the said Edward S. Rowse, Collector of Revenue of St. Louis County, Missouri, for enforcement and collection in the manner then provided by law.

That the total amount of said tax bills so made out and delivered to the said Edward S. Rowse, Collector as aforesaid, was some $3,519.04.

[fol. 18] That the said Edward S. Rowse, Collector as aforesaid, thereupon demanded the payment of said tax bills, and payment thereof having been refused by plaintiff, the said Edward S. Rowse, as Collector aforesaid, threatened and was about to proceed to collect the said taxes so assessed by levy upon and sale of the said lands.

That thereupon the plaintiff filed a suit as plaintiff in the St. Louis Circuit Court of St. Louis County, Missouri, to the October Term, 1867, against the said Edward S. Rowse, as Collector of the Revenue of St. Louis County, Missouri, as defendant. That by its bill or petition in said suit, the plaintiff set out and averred the passage of the Acts of the General Assembly of the State of Missouri hereinabove set forth, and its acceptance, organization and conduct under and in pursuance of and in the exercise of the powers and franchises to it granted by the said Acts; the gift, grant, legacy and devise to it, from various and sundry persons, and its acquisition, of a large amount of real and personal property in the County of St. Louis;

the assessment of the taxes and the levy of tax bills for the year 1866, as hereinabove set forth; the demand of payment of said tax bills, the refusal thereof, and the threatened collection and enforcement thereof by levy upon and sale of said lands by the said Edward S. Rowse, as Collector, as aforesaid.

[fol. 19] Plaintiff further set forth in its bill or petition that by reason of the provisions of said first mentioned Act of the General Assembly of Missouri, approved February 22, 1853, and of said Act amendatory thereof above set forth, said taxes were illegally assessed and were not, nor any part thereof, lawfully due from or payable by the plaintiff, for the reason that all property of plaintiff was, by said Acts of the General Assembly of Missouri, expressly exempt from taxation at all times; that the acts of the said Edward S. Rowse, Collector as aforesaid, defendant in said petition or bill, were such as to constitute and cast a cloud upon the title of plaintiff to the real property covered by the said tax bills; that the same questions were apt to and would constantly arise in each successive year in respect to successive tax bills made out and assessed against the plaintiff with respect to its property; and plaintiff, therefore, prayed in its said bill or petition, the court for its order and decree enjoining and restraining the said Edward S. Rowse, Collector as aforesaid, from collecting by levy and sale, the money claimed for taxes in and by said tax bills, or any part thereof, and from offering the said lands, or any part thereof, for sale, for any taxes alleged to have been assessed against the same, and that defendant be adjudged to pay the costs of the proceeding, and for other relief.

[fol. 20] That thereupon pursuant to the prayer of said petition or bill duly filed in the office of the Clerk of the St. Louis Circuit Court aforesaid, the said Edward S. Rowse, Collector of the Revenue of St. Louis County, Missouri, was duly summoned and commanded to appear in the said St. Louis Circuit Court at the October Term, 1867, thereof.

And thereupon the plaintiff moved for the issuance of a temporary injunction and restraining order against the said Edward S. Rowse, Collector as aforesaid, defendant, and such temporary injunction and restraining order was granted and ordered by the Court, wherein and whereby the said Edward S. Rowse, as Collector of the Revenue of

St. Louis County, Missouri was enjoined and restrained from collecting the taxes mentioned and set out in plaintiff's petition or bill of complaint, or from enforcing the collection thereof by sale of the property mentioned therein, under and by reason of the grounds set forth in plaintiff's said petition or bill of complaint.

That the said defendant, Edward S. Rowse, Collector as aforesaid, appeared at and to the said October Term, 1867, in and before the said St. Louis Circuit Court and filed a demurrer in said cause, wherein and whereby the said defendant demurred to the petition of plaintiff upon the ground that it did not set forth facts sufficient to constitute a cause of action, and for special cause of demurrer, [fol. 21] showed that the plaintiff, by its petition or bill of complaint, did not make such a case as entitled it to the relief prayed by its said bill of complaint or petition against the defendant.

That thereafter, to-wit, on or about the 21st day of December, 1867, the said demurrer to plaintiff's petition or bill of complaint having come on to be heard and being heard, the said demurrer was overruled by the said Court with costs; that thereupon the said Edward S. Rowse, as Collector of the Revenue of St. Louis County, Missouri, declined to plead further, and it was ordered by the said Court that final judgment be and the same was entered for the plaintiff. It was, therefore, duly considered and adjudged by the said Court that the temporary injunction theretofore granted be and the same was made perpetual, and that the plaintiff recover of defendant its costs and charges in this behalf expended.

That thereupon, and within the time and in the manner allowed by law, the said defendant, Edward S. Rowse, Collector as aforesaid, sued out and obtained from the Supreme Court of Missouri a writ of error to the said St. Louis Circuit Court to review its judgment and decree in the cause aforesaid; that the said writ of error and the record in said cause came on for hearing and for examination before the said Supreme Court of Missouri in the year [fol. 22] 1868, and the said cause was reviewed on error by the said Supreme Court of Missouri, and its judgment is reported in Volume 42, at page 308, of the published reports of the Supreme Court of the State of Missouri; that by its judgment, the Supreme Court of Missouri held that the exemption from taxation under its charter, as-

serted by plaintiff did not exist as against subsequent state laws, reversed the judgment theretofore rendered by the said St. Louis Circuit Court, and ordered plaintiff's petition dismissed.

That thereafter, and within the time and in the manner allowed by law, the plaintiff sued out and obtained from the Supreme Court of the United States a writ of error addressed to the Supreme Court of Missouri to review and reexamine the decree and decision of said last mentioned Court, upon the ground that said decree and decision was contrary to the rights claimed and asserted by the plaintiff, under the Constitution of the United States, which forbade any state to pass any law impairing the obligation of contracts.

That the said cause and the record therein, pursuant to the said writ of error, came on to be heard and was heard by and before the Supreme Court of the United States on the 23rd day of November, 1869, and was argued and [fol. 23] submitted to said Supreme Court of the United States for its decision.

That thereupon and thereafter, to-wit, on the 20th day of December, 1869, the Supreme Court of the United States gave and rendered its judgment and decision, reported as *The Washington University* v. *Rouse*, 75 U. S. (8 Wall.) 439 19 L. Ed. 498, and held that the charter of plaintiff constituted a contract which afforded to plaintiff a permanent exemption from taxation, any subsequent laws of the state notwithstanding, and the judgment of the Supreme Court of Missouri, was, therefore, reversed, and the cause remanded to said latter Court, with directions to proceed in conformity with the decision and opinion of the Supreme Court of the United States.

That thereafter, to-wit, on the 14th day of May, 1870, plaintiff, by its counsel, appeared before the Supreme Court of Missouri and moved said Court in compliance with the mandate and decision of the Supreme Court of the United States, to set aside and vacate its former judgment reversing the judgment of the St. Louis Circuit Court aforesaid, and to affirm the judgment of the St. Louis Circuit Court; that thereupon the Supreme Court of Missouri ordered and adjudged that its former judgment in the said cause be vacated and that the judgment of the said St. Louis Circuit Court be and the same was, in all things

[fol. 24] affirmed and ordered to stand in full force and effect.

10. Plaintiff further states that thereafter in the year 1931 the assessor of the City of St. Louis, then authorized by law to assess property in said city for state, city and school taxes, proceeded to assess state, city and school taxes as of June 1, 1931, due December 31, 1932 against sundry parcels of land and improvements thereon situated in the city of St. Louis, which were owned by the plaiptiff herein and which had been the property of the plaintiff herein at and before the time of such assessment; that bills for such taxes so assessed for the year 1931 aggregating $183,003.77 were made out by the officers of said City of St. Louis authorized to make out tax bills and were delivered to Edmond Koeln, the duly elected, qualified and acting Collector of Revenue in and for the City of St. Louis for enforcement and collection in the manner provided by law.

That the said Edmond Koeln, collector as aforesaid, thereupon demanded the payment of said tax bills and the payment thereof having been refused by plaintiff, the said Edmond Koeln, as collector aforesaid, threatened and was about to proceed to collect the said taxes so assessed by levy upon and sale of the said lands.

That thereupon on March 30, 1933, the plaintiff herein filed a suit as plaintiff in the Circuit Court of the City [fol. 25] of St. Louis against said Edmond Koeln, as collector of the City of St. Louis, as defendant, substantially identical with this petition, except for appropriate change of name of defendant, description of properties, amount of taxes, and except for this paragraph: that by its bill or petition in said suit plaintiff set out and averred the passage of the Acts of the General Assembly of the State of Missouri hereinabove set forth, and its existence, organization and conduct under and in pursuance of and in the exercise of the powers and franchises granted to it by said Acts, the gift, grant, legacy and devise to it from various and sundry persons and its acquisition of a large amount of real and personal property in the City of St. Louis and elsewhere, the assessment of the taxes and the levy of tax bills as hereinabove set forth, the demand of payment of said tax bills, the refusal thereof and the threatened col-

lection and enforcement thereof by levy upon and sale of said lands by said Edmond Koeln as collector as aforesaid.

Plaintiff further alleged in its bill or petition in such suit that by reason of the provisions of the said Act of the General Assembly of Missouri approved February 22, 1853, and of said Act amendatory thereof, above set forth, said taxes were illegally assessed and were not, nor any part thereof, lawfully due from or payable by the plaintiff, [fol. 26] for the reason that all property of plaintiff was by said Acts of the General Assembly of Missouri, expressly exempt from taxation at all times; that the judgment of the Supreme Court of the United States and the judgment of the St. Louis Circuit Court and of the Supreme Court of Missouri set forth in paragraph 9 hereof, constituted a title, right, privilege and immunity of plaintiff under the Constitution and statutes of the United States so that plaintiff was entitled under its charter and the Acts of the General Assembly of the State of Missouri composing the same to a permanent exemption of all its property from taxation and that the issues in such suit had been actually litigated, determined and adjudged by the former judgments above referred to; that the acts of the said Edmond Koeln, collector as aforesaid, defendant in said bill or petition, were such as to constitute and cast a cloud upon the title of plaintiff to the real property covered by the said tax bills; that the same questions were apt to and would constantly arise in each successive year in respect to successive tax bills made out and assessed against the plaintiff with respect to its property; and plaintiff, therefore, prayed in its said bill or petition for an order and decree of the Court restraining the said Edmond Koeln, collector as aforesaid, from collecting by levy and sale, the [fol. 27] money claimed for taxes in and by said tax bills or any part thereof, and from offering the said lands, or any part thereof, for sale for any taxes alleged to have been assessed against the same and for other appropriate relief.

That thereupon the said Edmond Koeln collector as aforesaid, appeared and filed his demurrer to plaintiff's petition therein and motion to dismiss the same on the ground that said petition did not state facts sufficient to constitute a cause of action, which demurrer and motion were overruled by Court; that thereupon on December 12, 1933, the said defendant Edmond Koeln, collector as aforesaid, filed

his answer to plaintiff's petition denying each and every allegation in plaintiff's petition and not specifically admitted therein, and stating that each and every parcel of real estate described in plaintiff's petition was under the Constitution and laws of the State of Missouri subject to taxation and not exempt from any taxes and that plaintiff had a full, complete and adequate remedy at law; that thereafter the said cause came on regularly for trial at the February, 1934, Term of the Circuit Court of the City of St. Louis and at the close of plaintiff's case defendant demurred to the evidence and rested upon said demurrer and the Court entered its judgment in favor of plaintiff and against the defendant and ordered that a permanent injunction be issued against defendant; that thereafter [fol. 28] within the time and in the manner allowed by law the said defendant Edmond Koeln, collector as aforesaid, appealed from the judgment of the Circuit Court of the City of St. Louis to the Supreme Court of Missouri, and after the lodgment of such appeal, W. F. Baumann, successor in office to said Edmond Koeln, was substituted as appellant; that thereafter on July 30, 1937, the Supreme Court of Missouri rendered its judgment and decision (reported as *Washington University* v. *Baumann*, 108 S. W. (2d) 403) affirming the judgment of the Circuit Court of the City of St. Louis, holding that under the charter and the Acts of the General Assembly of the State of Missouri, hereinabove set out, all property of plaintiff, whether or not occupied and directly used for educational purposes, was exempt from taxation and that such charter was a valid contract with the State of Missouri that could not be impaired by subsequent legislation and that plaintiff was entitled to the equitable relief prayed for therein being substantially identical with the relief prayed for herein, having no plain, adequate or complete remedy at law.

11. That the judgment aforesaid rendered by the Supreme Court of the United States constitutes a title, right, privilege and immunity which is especially set up and claimed by the plaintiff, under the Constitution and Stat- [fol. 29] utes of the United States, as under a commission held and authority exercised under the United States; that by and under the said judgment so rendered, plaintiff is entitled, under its charter and under the acts of the General Assembly of the State of Missouri composing the same

hereinbefore set forth, to a permanent exemption of all its property from taxation, including the property hereinbefore described as now being sought to be taxed.

That the judgment of the Supreme Court of the United States and the judgments of the St. Louis Circuit Court above described, and the judgments of the Supreme Court of Missouri, affirming in all things the said judgments of the St. Louis Circuit Court, have ever since remained, and now are, in full force and effect; that the controversies so adjudged and determined by the said judgments and the causes of action, and the issues, and the subject-matter were the same as involved in this instant suit, and the proceedings in the former suits aforesaid were taken for the same purpose, and the same points and questions were actually litigated and decided in said former suits and proceedings, and the present defendants are bound by said judgments and decisions in said former suits and proceedings.

Wherefore, the premises considered, plaintiff prays the Court to order, adjudge and decree:

[fol. 30] First. That the parcels of property, and each of them, described in plaintiff's amended petition as owned by plaintiff were and are, under the Acts of the General Assembly of the State of Missouri incorporating plaintiff and constituting its charter, exempt from taxation;

Second. That by reason of said charter exemption and said laws, the assessment and levy of taxes upon the said property and the issuance of tax bills against the same were and are contrary to law and void;

Third. That the tax bills made out and issued for the 1933 taxes against the said property, and any parcels thereof, were and are unauthorized by law and void;

Fourth. That the said tax bills, and each of them, and any re-issues or renewals thereof, or certificates of purchase, if any, ought to be and are ordered cancelled;

Fifth. That the defendant Frank McCabe, as Assessor of Kansas City, Missouri, his deputies, agents and servants, be temporarily enjoined and restrained from assessing any general city taxes against any of plaintiff's said property;

Sixth. That the defendant Frank McCabe, as Assessor of Kansas City, Missouri, his deputies, agents and servants be forever enjoined and restrained from assessing any general city taxes against any of plaintiff's said property;

[fol. 31] Seventh. That the defendant, H. J. Gorman, as Treasurer of Kansas City, Missouri, his deputies, agents and servants, be temporarily enjoined and restrained from seizing, advertising, offering for sale or selling plaintiff's said property, or any parcel thereof, or any of plaintiff's property, for the enforcement or collection of any of said tax bills, or any renewals or re-issues thereof, and from in any manner enforcing or collecting, or attempting to collect or enforce, the payment of any of said tax bills, or any renewals or re-issues thereof;

Eighth. That the defendant, H. J. Gorman, as Treasurer of Kansas City, Missouri, his deputies, agents and servants, be finally and forever enjoined and restrained from seizing, advertising, offering for sale or selling plaintiff's said property, or any parcel thereof, or any of plaintiff's property, for the enforcement or collection of any of said tax bills, or any renewals or re-issues thereof, and from in any manner enforcing or collecting, or attempting to collect or enforce, the payment of any of said tax bills, or any renewals or re-issues thereof; and that the Court grant the plaintiff such other and further relief, whether of the same or of different character, as to the Court under the facts and circumstances set forth shall seem just and proper.

[fol. 32] Count II

For its second and further cause of action against defendants plaintiff repeats and incorporates by reference with the same force and effect as if actually repeated herein, all the allegations and averments set forth in paragraphs or sections, 1, 2, 3, 4, 5 and 6 of Count I of this amended petition and further states 7:

7. That notwithstanding plaintiff's exemption from taxation so contracted for by the Acts of the General Assembly constituting plaintiff's charter and accepted and relied upon by plaintiff and its donors, defendant Frank McCabe as the Assessor of Kansas City, Missouri, acting and professing to act under said sections of the Missouri Constitution above set forth and under said Statutes of the State of

Missouri and under the Charter and Ordinances of Kansas City, Missouri has illegally and without any right or jurisdiction, attempted to assess for taxation as against this plaintiff and has assessed as against this plaintiff, the real estate hereinabove described as being owned by plaintiff and pursuant thereto and acting and professing to act under like authority, defendant H. J. Gorman as Treasurer of Kansas City, Missouri, has demanded of plaintiff payment of general city taxes as follows:

Undivided ½ Int. Lot 10, Block 6, McDaniel's Addition	1934 taxes	$ 45.07
[fol. 33] Lots 6 and 7, Block 2, Ashburn's Addition	1934 taxes	3333.46
Lot 313, Block 24, McGee's Addition	1934 taxes	3866.84

amounting in the aggregate to $7245.37 at this time. Copies of such tax bills marked Exhibits B, C and D respectively are attached hereto and made a part hereof. Said defendant has advertised the said properties for sale for nonpayment of such taxes, as provided by law, and has sold or is about to sell the same, and unless enjoined and restrained by decree of this Court, will proceed to enforce payment of said taxes against and out of the property of the plaintiff and sell the same and issue assignable certificates of purchase to purchaser thereof, all to plaintiff's great and irreparable damage.

Plaintiff further repeats and incorporates by reference with the same force and effect as if actually repeated herein all the allegations and averments set forth in paragraphs or sections 8, 9, 10 and 11 of Count I of this amended petition.

Wherefore, the premises considered, plaintiff prays the Court to order, adjudge and decree:

First. That the parcels of property, and each of them, described in plaintiff's amended petition as owned by plaintiff were and are, under the Acts of the General Assembly [fol. 34] of the State of Missouri incorporating plaintiff and constituting its charter, exempt from taxation;

Second. That by reason of said charter exemption and said laws, the assessment and levy of taxes upon the said

property and the issuance of tax bills against the same were and are contrary to law and void;

Third. That the tax bills made out and issued for the 1934 taxes against the said property, and any parcels thereof, were and are unauthorized by law and void;

Fourth. That the said tax bills, and each of them, and any re-issues or renewals thereof, or certificates of purchase, if any, ought to be and are ordered cancelled;

Fifth. That the defendant Frank McCabe, as Assessor of Kansas City, Missouri, his deputies, agents and servants be temporarily enjoined and restrained from assessing any general city taxes against any of plaintiff's said property;

Sixth. That the defendant Frank McCabe, as Assessor of Kansas City, Missouri, his deputies, agents and servants be forever enjoined and restrained from assessing any general city taxes against any of plaintiff's said property;

Seventh. That the defendant, H. J. Gorman, as Treasurer [fol. 35] of Kansas City, Missouri, his deputies, agents and servants, be temporarily enjoined and restrained from seizing, advertising, offering for sale or selling plaintiff's said property, or any parcel thereof, or any of plaintiff's property, for the enforcement or collection of any of said tax bills, or any renewals or re-issues thereof, and from in any manner enforcing or collecting, or attempting to collect or enforce, the payment of any of said tax bills, or any renewals or re-issues thereof;

Eighth. That the defendant, H. J. Gorman, as Treasurer of Kansas City, Missouri, his deputies, agents and servants, be finally and forever enjoined and restrained from seizing, advertising, offering for sale or selling plaintiff's said property, or any parcel thereof, or any of plaintiff's property, for the enforcement or collection of any of said tax bills, or any renewals or re-issues thereof, and from in any manner enforcing or collecting, or attempting to collect or enforce, the payment of any of said tax bills, or any renewals or re-issues thereof; and that the Court grant the plaintiff such other and further relief, whether of the same or of different character, as to the Court under the facts and circumstances set forth shall seem just and proper.

Count III

For its third and further cause of action against defend-
[fol. 36] ants plaintiff repeats and incorporates by reference with the same force and effect as if actually repeated herein, all the allegations and averments set forth in paragraphs or sections 1, 2, 3, 4, 5 and 6 of Count I of this amended petition and further states 7:

7. That notwithstanding plaintiff's exemption from taxation so contracted for by the Acts of the General Assembly constituting plaintiff's charter and accepted and relied upon by plaintiff and its donors, defendant Frank McCabe as the Assessor of Kansas City, Missouri, acting and professing to act under said sections of the Missouri Constitution above set forth and under said Statutes of the State of Missouri and under the Charter and Ordinances of Kansas City, Missouri has illegally and without any right or jurisdiction, attempted to assess for taxation as against this plaintiff and has assessed as against this plaintiff, the real estate hereinabove described as being owned by plaintiff and pursuant thereto and acting and professing to act under like authority, defendant H. J. Gorman as Treasurer of Kansas City, Missouri, has demanded of plaintiff payment of general city taxes as follows:

Undivided ½ Int. Lot 10, Block 6, McDaniel's Addition	1935 taxes	$ 42.70
Lots 6 and 7, Block 2, Ashburn' Addition	1935 taxes	2608.58
Lot 313, Block 24, McGee's Addition	1935 taxes	3662.49

[fol. 37] amounting in the aggregate to $6313.77 at this time. Copies of such tax bills, marked Exhibits E, F and G respectively are attached hereto and made a part hereof. Said defendant has advertised the said properties for sale for nonpayment of such taxes, as provided by law, and has sold or is about to sell the same, and unless enjoined and restrained by decree of this Court, will proceed to enforce payment of said taxes against and out of the property of the plaintiff and sell the same and issue assignable certificates of purchase to purchaser thereof, all to plaintiff's great and irreparable damage.

Plaintiff further repeats and incorporates by reference with the same force and effect as if actually repeated

herein all the allegations and averments set forth in paragraphs or sections 8, 9, 10 and 11 of Count I of this amended petition.

Wherefore, the premises considered plaintiff prays the Court to order, adjudge and decree:

First. That the parcels of property, and each of them, described in plaintiff's amended petition as owned by plaintiff were and are, under the Acts of the General Assembly of the State of Missouri incorporating plaintiff and constituting its charter, exempt from taxation;

Second. That by reason of said charter exemption and [fol. 38] said laws, the assessment and levy of taxes upon the said property and the issuance of tax bills against the same were and are contrary to law and void;

Third. That the tax bills made out and issued for the 1935 taxes against the said property, and any parcels thereof, were and are unauthorized by law and void;

Fourth. That the said tax bills, and each of them, and any re-issues or renewals thereof, or certificates of purchase, if any, ought to be and are ordered cancelled;

Fifth. That the defendant Frank McCabe, as Assessor of Kansas City, Missouri, his deputies, agents and servants be temporarily enjoined and restrained from assessing any general city taxes against any of plaintiff's said property;

Sixth. That the defendant Frank McCabe, as Assessor of Kansas City, Missouri, his deputies, agents and servants be forever enjoined and restrained from assessing any general city taxes against any of plaintiff's said property;

Seventh. That the defendant, H. J. Gorman, as Treasurer of Kansas City, Missouri, his deputies, agents and servants, be temporarily enjoined and restrained from seizing, advertising, offering for sale or selling plaintiff's said property, or any parcel thereof, or any of plaintiff's property, [fol. 39] for the enforcement or collection of any of said tax bills, or any renewals or re-issues thereof, and from in any manner enforcing or collecting, or attempting to collect or enforce, the payment of any of said tax bills, or any renewals or re-issues thereof;

Eighth. That the defendant, H. J. Gorman, as Treasurer of Kansas City, Missouri, his deputies, agents and servants, be finally and forever enjoined and restrained from seizing, advertising, offering for sale or selling plaintiff's said property, or any parcel thereof, or any of plaintiff's property, for the enforcement or collection of any of said tax bills, or any renewals or reissues thereof, and from in any manner enforcing or collecting, or attempting to collect or enforce, the payment of any of said tax bills, or any renewals or re-issues thereof; and that the Court grant the plaintiff such other and further relief, whether of the same or of different character, as to the Court under the facts and circumstances set forth shall seem just and proper.

Count IV

For its fourth and further cause of action against defendants plaintiff repeats and incorporates by reference with the same force and effect as if actually repeated herein, all the allegations and averments set forth in paragraphs [fol. 40] or sections 1, 2, 3, 4, 5 and 6 of Count I of this amended petition and further states 7:

7. That notwithstanding plaintiff's exemption from taxation so contracted for by the Acts of the General Assembly constituting plaintiff's charter and accepted and relied upon by plaintiff and its donors, defendant Frank McCabe as the Assessor of Kansas City, Missouri, acting and professing to act under said sections of the Missouri Constitution above set forth and under said Statutes of the State of Missouri and under the Charter and Ordinances of Kansas City, Missouri has illegally and without any right or jurisdiction, attempted to assess for taxation as against this plaintiff and has assessed as against this plaintiff, the real estate hereinabove de-cribed as being owned by plaintiff and pursuant thereto and acting and professing to act under like authority, defendant H. J. Gorman as Treasurer of Kansas City, Missouri, has demanded of plaintiff payment of general city taxes as follows:

Undivided ½ Int. Lot 10, Block 6, McDaniel's Addition	1936 taxes	$ 19.77
Lots 6 and 7, Block 2, Ashburn's Addition	1936 taxes	2376.94
Lot 313, Block 24, McGee's Addition	1936 taxes	3328.12

amounting in the aggregate to $5724.83 at this time. Copies [fol. 41] of such tax bills, marked Exhibits H, I and J respectively are attached hereto and made a part hereof. Said defendant has advertised the said properties for sale for nonpayment of such taxes, as provided by law, and has sold or is about to sell the same, and unless enjoined and restrained by decree of this Court, will proceed to enforce payment of said taxes against and out of the property of the plaintiff and sell the same and issue assignable certificates of purchase to purchaser thereof, all to plaintiff's great and irreparable damage.

Plaintiff further repeats and incorporates by reference with the same force and effect as if actually repeated herein all the allegations and averments set forth in paragraphs or sections 8, 9, 10 and 11 of Count I of this amended petition.

Wherefore, the premises considered, plaintiff prays the Court to order, adjudge and decree:

First: That the parcels of property, and each of them, described in plaintiff's amended petition as owned by plaintiff were and are, under the Acts of the General Assembly of the State of Missouri incorporating plaintiff and constituting its charter, exempt from taxation;

Second: That by reason of said charter exemption and said laws, the assessment and levy of taxes upon the said [fol. 42] property and the issuance of tax bills against the same were and are contrary to law and void;

Third: That the tax bills made out and issued for the 1936 taxes against the said property, and any parcels thereof, were and are unauthorized by law and void;

Fourth: That the said tax bills, and each of them, and any re-issues or renewals thereof, or certificates of purchase, if any, ought to be and are ordered cancelled;

Fifth: That the defendant Frank McCabe, as Assessor of Kansas City, Missouri his deputies, agents and servants be temporarily enjoined and restrained from assessing any general city taxes against any of plaintiff's said property;

Sixth: That the defendant Frank McCabe, as Assessor of Kansas City, Missouri, his deputies, agents and servants be forever enjoined and restrained from assessing any general city taxes against any of plaintiff's said property;

Seventh: That the defendant, H. J. Gorman, as Treasurer of Kansas City, Missouri, his deputies, agents and servants, be temporarily enjoined and restrained from seizing, advertising, offering for sale or selling plaintiff's said property, or any parcel thereof, or any of plaintiff's property, for the [fol. 43] enforcement or collection of any of said tax bills, or any renewals or re-issues thereof, and from in any manner enforcing or collecting, or attempting to collect or enforce, the payment of any of said tax bills, or any renewals or re-issues thereof;

Eighth: That the defendant, H. J. Gorman, as Treasurer of Kansas City, Missouri, his deputies, agents and servants, be finally and forever enjoined and restrained from seizing, advertising, offering for sale or selling plaintiff's said property, or any parcel thereof, or any of plaintiff's property, for the enforcement or collection of any of said tax bills, or any renewals or reissues thereof, and from in any manner enforcing or collecting, or attempting to collect or enforce, the payment of any of said tax bills, or any renewals or re-issues thereof; and that the Court grant the plaintiff such other and further relief, whether of the same or of different character, as to the Court under the facts and circumstances set forth shall seem just and proper.

Count V

For its fifth and further cause of action against defendants plaintiff repeats and incorporates by reference with the same force and effect as if actually repeated herein, all the allegations and averments set forth in paragraphs or sections 1, 2, 3, 4, 5 and 6 of Count I of this amended petition and further states 7:

[fol. 44] 7. That notwithstanding plaintiff's exemption from taxation so contracted for by the Acts of the General Assembly constituting plaintiff's charter and accepted and relied upon by plaintiff and its donors, defendant Frank McCabe as the Assessor of Kansas City, Missouri, acting and professing to act under said sections of the Missouri Constitution above set forth and under said Statutes of the State of Missouri and under the Charter and Ordinances of Kansas City, Missouri has illegally and without any right or jurisdiction, attempted to assess for taxation as against this plaintiff and has assessed as against this plaintiff, the

real estate hereinabove described as being owned by plaintiff and pursuant thereto and acting and professing to act under like authority, defendant H. J. Gorman as Treasurer of Kansas City, Missouri, has demanded of plaintiff payment of general city taxes as follows:

Undivided ½ Int. Lot 10, Block 6, McDaniel's Addition	1937 taxes	$ 17.62
Lots 6 and 7, Block 2, Ashburn's Addition	1937 taxes	2131.80
Lot 313, Block 24, McGee's Addition	1937 taxes	2898.89

amounting in the aggregate to $5048.31 at this time. Copies of such tax bills, marked Exhibits K, L and M respectively are attached hereto and made a part hereof. Said de-
[fol. 45] fendant has advertised the said properties for sale for nonpayment of such taxes, as provided by law, and has sold or is about to sell the same, and unless enjoined and restrained by decree of this Court, will proceed to enforce payment of said taxes against and out of the property of the plaintiff and sell the same and issue assignable certificates of purchase to purchaser thereof, all to plaintiff's great and irreparable damage.

Plaintiff further repeats and incorporates by reference with the same force and effect as if actually rep-ated herein all the allegations and averments set forth in paragraphs or sections 8, 9, 10 and 11 of Count I of this amended petition.

Wherefore, the premises considered, plaintiff prays the Court to order, adjudge and decree:

First: That the parcels of property, and each of them, described in plaintiff's amended petition as owned by plaintiff were and are, under the Acts of the General Assembly of the State of Missouri incorporating plaintiff and constituting its charter, exempt from taxation;

Second: That by reason of said charter exemption and said laws, the assessment and levy of taxes upon the said property and the issuance of tax bills against the same were and are contrary to law and void;

[fol. 46] Third: That the tax bills made out and issued for the 1937 taxes against the said property, and any parcels thereof, were and are unauthorized by law and void;

Fourth: That the said tax bills, and each of them, and any re-issues or renewals thereof, or certificates of purchase, if any, ought to be and are ordered cancelled;

Fifth: That the defendant Frank McCabe, as Assessor of Kansas City, Missouri, his deputies, agents and servants be temporarily enjoined and restrained from assessing any general city taxes against any of plaintiff's said property;

Sixth: That the defendant Frank McCabe, as Assessor of Kansas City, Missouri, his deputies, agents and servants be forever enjoined and restrained from assessing any general city taxes against any of plaintiff's said property;

Seventh: That the defendant, H. J. Gorman, as Treasurer of Kansas City, Missouri, his deputies, agents and servants, be temporarily enjoined and restrained from seizing, advertising, offering for sale or selling plaintiff's said property, or any parcel thereof, or any of plaintiff's property, for the enforcement or collection of any of said tax bills, or any renewals or re-issues thereof, and from in any manner enforcing or collecting, or attempting to collect or enforce, [fol. 47] the payment of any of said tax bills, or any renewals or re-issues thereof;

Eighth: That the defendant, H. J. Gorman, as Treasurer of Kansas City, Missouri, his deputies, agents and servants, be finally and forever enjoined and restrained from seizing, advertising, offering for sale or selling plaintiff's said property, or any parcel thereof, or any of plaintiff's property, for the enforcement or collection of any of said tax bills, or any renewals or reissues thereof, and from in any manner enforcing or collecting, or attempting to collect or enforce, the payment of any of said tax bills, or any renewals or reissues thereof; and that the Court grant the plaintiff such other and further relief, whether of the same or of different character, as to the Court under the facts and circumstances set forth shall seem just and proper.

Polk and Williams, McCune, Caldwell & Downing,
Attorneys for Plaintiff.

Duly sworn to by R. B. Caldwell. Jurat omitted in printing.

WEST

Tract No. 44493

Certificate of Redemption $ 23.71

This Receipt Is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo., Jan 8 193

To Washington University

Address St. Louis, Mo

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that _____ Dollars and _____ Cents is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. _____ in the Book of Sales of 1933 being

Undiv 1/2 Int Lot 10, Block 6 McDaniel's Add

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee		$
City Tax for the year _____ and Interest		$
" " " " " " "		$
" " " " " 1933 " "		$ 23.71
" " " " " " "		$
State and County Tax for the year _____ and Interest		$
" " " " " " " " " "		$
" " " " " " " " " "		$
Special Taxes for _____ and Interest		$
" " " _____ " " _____		$
Park Purchase Taxes		$
Repairs		$
	23.71	
Total		$

COUNTERSIGNED BY

Maurice Carey City Treas.

_____ Commissioner of Accounts By _____ Deputy.

Pontiac Pg. Co.—34493

Exhibit A

3174
42
6348
12696
13308
3174
4507

EAST KC

Tract No. 44564

Certificate of Redemption $ 4507

This Receipt Is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo., Dec 193 7

To Washington Mercantile

Address St Louis Mo

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that _____ Dollars and _____ Cents is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. _____ in the Book of Sales of 1934 being

Lot 10 Blk 6 McDonald Place

THIS RECEIPT INCLUDES THE FOLLOWING: 4507

Recording Fee		$
City Tax for the year 1934 and Interest		$
" " " " " ____ " "		$
" " " " " ____ " "		$
" " " " " ____ " "		$
State and County Tax for the year ____ and Interest		$
" " " " " " " ____ " "		$
" " " " " " " ____ " "		$
Special Taxes for ____ and Interest		$
" " " ____ " "		$
Park Purchase Taxes		$
Repairs		$
	Total	$ 4507

COUNTERSIGNED BY

Maurice Carey City Treas.

_____ Commissioner of Accounts

By _____ Deputy.

Eyh B

48-A

WEST

Tract No. 86757

Certificate of Redemption $ 3333.46

This Receipt Is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo., Dec 1927

To Washington University

Address St Louis Mo.

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that

Dollars and Cents

is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. in the Book of Sales of 1924 being

Lots 677 Old Ashburn's Add

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee		3333.46
City Tax for the year 1924 and Interest		
" " " " " " "		
" " " " " " "		
State and County Tax for the year and Interest		
" " " " " " " "		
Special Taxes for and Interest		
" " "		
Park Purchase Taxes	10 cc	
Repairs		
Total		3333.46

COUNTERSIGNED BY

Maurice Carey City Treas.

By WC Deputy.

Commissioner of Accounts

Peaslee Pig. Co.—24422

Earl C 48-B

2347.51 42
1695.02
93900
95.95
2347.51
95.95
3338.46
2263.50
46.80

WEST

Tract No. 113845

Certificate of Redemption

38664

This Receipt Is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo., Dec 19 32

To Washington University

Address St Louis, Mo.

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that

Dollars and Cents

is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. in the Book of Sales of 1934 being

Lot 313 Blk 24 N. Gem Add

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee		
City Tax for the year 1934 and Interest		38664
" " " " " " " "		
" " " " " " " "		
State and County Tax for the year and Interest		
" " " " " " " "		
" " " " " " " "		
Special Taxes for and Interest		
" " " " " "		
Park Purchase Taxes		
Repairs	Dec	
Total		38664

COUNTERSIGNED BY

Maurice Carey City Treas.

Commissioner of Accounts By Deputy.

Franklin Pig. Co.—34488

Exhibit Q 48-C

2723.13
42
54462
1089252
1143.714 6
7231 3
38664

2619 75
49.30

3285-
30
98550
3285-
42 70

EAST KC

Tract No. 44700

Certificate of Redemption $ 42 70

This Receipt is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo., Dec 193 7

To Washington University

Address St Louis, Mo.

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that .....

..... Dollars and ..... Cents

is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. ..... in the Book of Sales of 1935 being .....

Lot 10 Blk 6 McDaniel Add

(under 1/3 Int) KC

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee		42 70
City Tax for the year 1935 and Interest		$
" " " " " " " "		$
" " " " " " " "		$
" " " " " " " "		$
State and County Tax for the year ..... and Interest		$
" " " " " " " "		$
" " " " " " " "		$
Special Taxes for ..... and Interest		$
" " " ..... " "		$
Park Purchase Taxes		$
Repairs	Due	$
Total		$ 42 70

COUNTERSIGNED BY

Maurice Carey City Treas.

..... Commissioner of Accounts By ..... Deputy.

Publisher Pr. Co.- 04888

Exh E 48-D

WEST KC

Tract No. 87609

Certificate of Redemption $ 2608 58

This Receipt Is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo. Dec 1937

To Washington University

Address St Louis Mo

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that .....

..... Dollars and ..... Cents

is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. 1 in the Book of Sales of 1935 being

Lots 697 Blk 2

Ashburns Add

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee		$ 2608 58
City Tax for the year 1935 and Interest		$
" " " " " " " "		$
" " " " " " " "		$
State and County Tax for the year ____ and Interest		$
" " " " " " " "		$
Special Taxes for ____ and Interest		$
" " " " "		$
Park Purchase Taxes		$
Repairs Dec		$ 2608 58
Total		$ 2608 58

COUNTERSIGNED BY

Maurice Carey City Treas.

..... Commissioner of Accounts By ..... Deputy.

Brenner Pig. Co.—36888

Exhibit 3

48-E

2006.60 30
60.98 00
2066 60
2608 58

1908 00
58.50

WEST

Tract No. 115330

Certificate of Redemption

$3662.49

This Receipt Is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo. Dec 1937

To Washington University

Address St Louis, Mo.

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that

Dollars and Cents

is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. in the Book of Sales of 1935 being

Lot 313 Blk 24, Mc Gees Add

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee	3662 49
City Tax for the year 1935 and Interest	
State and County Tax for the year and Interest	
Special Taxes for and Interest	
Park Purchase Taxes	Dec
Repairs	
Total	3662 49

COUNTERSIGNED BY

Maurice Carey City Treas.

Commissioner of Accounts By Deputy.

Penshaw Pa. Co.—24888

Exhibit 9 48-F

2817.30
845190
2817.30
366249

2699.75
61.62

1676
18
1340 8
1676 8
3016
3.16
16
19.77

EAST 10c

Tract No. 44367

Certificate of Redemption $ 1922

This Receipt Is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo. Dec 1927

To Washington University

Address St Louis Mo

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that _____ Dollars and _____ Cents is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. _____ in the Book of Sales of 1926 being

Lot 10 Blk 6 McDaniels Add
(undiv. ½ int)

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee		1922
City Tax for the year 1926 and Interest		
" " " " " _____ " "		
" " " " " _____ " "		
" " " " " _____ " "		
State and County Tax for the year _____ and Interest		
" " " " " " _____ " "		
" " " " " " _____ " "		
Special Taxes for _____ and Interest		
" " " _____ " "		
Park Purchase Taxes		
Repairs	Dec	
Total		1922

COUNTERSIGNED BY

Maurice Carey City Treas.

_____ Commissioner of Accounts By _____ Deputy.

Esh H.

48-G

Pedrick Pub. Co.—34000

WEST KC

Tract No. 86545

Certificate of Redemption $ 2376 94

This Receipt Is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo., Dec 1937

To Washington University

Address St Louis Mo.

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that ..... Dollars and ..... Cents is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. ..... in the Book of Sales of 1936 being

Lots 647 Blk. 2 Ashburn's add

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee		$ 2376 94
City Tax for the year 1936	and Interest	$
" " " " "	" "	$
" " " " "	" "	$
" " " " "	" "	$
State and County Tax for the year	and Interest	$
" " " " " "	" "	$
" " " " " "	" "	$
Special Taxes for	and Interest	$
" " "	" "	$
Park Purchase Taxes		$
Repairs Dec		$
Total		$ 2376 94

COUNTERSIGNED BY

Maurice Carey City Treas.

Commissioner of Accounts By Deputy.

Franklin Pr. Co.—34428

Exhibit 48-H

20067 27 18
160384
20067
36121
20067 4
2367

1405 00
58 50

2735 70
18
2189 56 0
23570
5924 26
2735 70
3328 12

WEST [illegible]

Tract No. 113398

Certificate of Redemption $ 3328.12

This Receipt Is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo., Dec 193 7

To Washington University

Address St Louis Mo.

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that ..... Dollars and ..... Cents is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. ..... in the Book of Sales of 1936 being

Lot 313 Blk 24 Mo Geo Add

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee	3328.12
City Tax for the year 1936 and Interest	$
" " " " " _____ " "	$
" " " " " _____ " "	$
" " " " " _____ " "	$
State and County Tax for the year _____ and Interest	$
" " " " " " " _____ " "	$
" " " " " " " _____ " "	$
Special Taxes for _____ and Interest	$
" " " _____ " " _____	$
Park Purchase Taxes	$
Repairs Dec	$
Total	3328.12

COUNTERSIGNED BY

Maurice Carey City Treas.

_____ Commissioner of Accounts By MC Deputy.

Publishers Pkg. Co.—20488

Eda J

48-I

1676
6
10056
1676
17 76

KC

EAST

Tract No. 45731

Certificate of Redemption

$ 17 76

This Receipt Is Not Valid Unless Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo., Dec 1937

To Washington University

Address St Louis, Mo.

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that _____ Dollars and _____ Cents is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. _____ in the Book of Sales of 1937 being

Undiv ½ Lot 10, block 6 McDaniel's Add

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee		$ 17 76
City Tax for the year 1937	and Interest	$
" " " " "	" "	$
" " " " "	" "	$
" " " " "	" "	$
State and County Tax for the year	and Interest	$
" " " " " " "	" "	$
" " " " " " "	" "	$
Special Taxes for	and Interest	$
" " "	" "	$
Park Purchase Taxes		$
Repairs Dec		$
Total		$ 17 76

Back '33-'34-'35 '36

COUNTERSIGNED BY

Maurice Carey City Treas.

By MC

Commissioner of Accounts

11

Exh K 48-J

2011 SS
6
12069 30
2011 11
2 13180

WEST CC

Tract No. 87568

Certificate of Redemption

$ 2131 80

This Receipt Is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo., Dec 1937

To Washington Mayorath

Address St Louis, Mo

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that ..... Dollars and ..... Cents is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. ..... in the Book of Sales of 1937 being Lots 6 & 7, Blk 2 Ashtonia Add

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee		2131 80
City Tax for the year 1937 and Interest		
" " " " " ____ " "		
" " " " " ____ " "		
" " " " " ____ " "		
State and County Tax for the year ____ and Interest		
" " " " " " " ____ " "		
" " " " " " " ____ " "		
Special Taxes for ____ and Interest		
" " " ____ " "		
Park Purchase Taxes Dec		
Repairs		
Total		2131 80

Bade
34-35 & 36
1912.50
58.75

COUNTERSIGNED BY

Maurice Carey City Treas.

..... Commissioner of Accounts By WC ..... Deputy.

Prentice Pig. Co.—24200

Ed L 48-K

27348 1
164086
27348
16408
28988

WEST

Tract No. 115273

Certificate of Redemption

$ 2898 89

This Receipt Is Not Valid Until Countersigned by Commissioner of Accounts

TAX PAYER'S COPY

Kansas City, Mo., Dec 193 7

To Washington Mutual

Address St Louis Mo.

I, MAURICE CAREY, City Treasurer of Kansas City, Missouri, certify that .....

.....Dollars and .....Cents

is the amount required this day to redeem the following described tract or parcel of real property in Kansas City, Missouri, to-wit: Parcel No. ..... in the Book of Sales of 1937 being .....

Lot 313 Blk 24 McGees add

THIS RECEIPT INCLUDES THE FOLLOWING:

Recording Fee		$ 2898 89
City Tax for the year 1937 and Interest		$
" " " " " ..... " "		$
" " " " " ..... " "		$
State and County Tax for the year ..... and Interest		$
" " " " " " " ..... " "		$
" " " " " " " ..... " "		$
Special Taxes for ..... and Interest		$
" " " ..... " "		$
Park Purchase Taxes		$
Repairs Dec		$
Total		$ 2898 89

Back 34-35-36

26190 0
6150

COUNTERSIGNED BY

Maurice Carey City Treas.

..... Commissioner of Accounts By WC ..... Deputy.

Prentice Pkg. Co.—24780

Exhibit 48-L

[fol. 49] On the same day, January 26, 1940, and at the same time by agreement of parties and by leave of Court, defendants refiled their answer to plaintiff's amended petition as their answer to plaintiff's amended petition as amended January 26, 1940, and said cause was assigned by the Court to Division No. 8.

Defendant's answer to said amended petition is as follows:

ANSWER TO AMENDED PETITION

Count I

Come now defendants and for answer to the amended petition of plaintiff filed herein, state:

(1) They admit the allegations of Paragraph 1 of said amended petition.

(2) They admit the allegations of Paragraph 2 of said amended petition.

(3) They admit that since its creation by the original act of the General Assembly of the State of Missouri that plaintiff has continually and actively engaged in the prosecution of the purposes of its incorporation, but deny so far as the subsequent allegations of this answer affect the same that the prosecution of such purposes were under its said charter. Defendants admit the remaining allegations of said paragraph except that they deny that the annual expenditure of [fol. 50] plaintiff is far in excess of any income derived, and deny that its total income from its schools is not in excess of $1,200,000.

(4) They deny the allegations of Paragraph 4 of said petition.

(5) They admit that the Constitution of the State of Missouri as alleged in Paragraph 5 of the petition went into effect on the date alleged and that it is the supreme law of the State of Missouri. They deny that as applied to this plaintiff said constitutional provisions are contrary to and in violation of section 10 of Article I of the Constitution of the United States, in that if applied to this plaintiff the same would impair the obligation of contracts.

They admit that Sections 9742-3, Revised Statutes of Missouri, 1929, are as set forth in said paragraph, but deny that

as applied to plaintiff and its property said sections are null and void as being contrary to and in violation of Section 10, Article I of the Constitution of the United States, in that the same impair the obligation of contracts.

(6) They admit the allegations of Paragraph 6 of said petition.

(7) They admit the allegations of Paragraph 7 of said petition except that they deny that the acts of defendants [fol. 51] are illegal and without any right or jurisdiction, and deny that the acts therein alleged and contemplated by defendants would be to plaintiff's great and irreparable damage.

(8) They deny the allegations of Paragraph 8 of said petition.

(9) They admit the allegations of Paragraph 9 of said petition.

(10) They admit the allegations of Paragraph 10 of said petition except that they deny that the holding of the Supreme Court of Missouri and the effect of the judgment in *University* v. *Bauman*, 108 S. W. (2d) 403, was as set forth in said paragraph.

(11) They deny the allegations of Paragraph 11 of said petition.

(12) Further answering, they deny each and every allegation contained in plaintiff's petition and not heretofore specifically admitted herein.

(13) Further answering, defendants state that each and every parcel of real estate described in said count of plaintiff's petition is and was on May 1, 1933, under the Constitution and Laws of the State of Missouri, and under the Charter and Ordinances of Kansas City, subject to taxation and is not and was not on said date entitled to exemption from any taxes.

[fol. 52] (14) For further answer, defendants state that the property described in said first count of plaintiff's petition was, at the time said property was acquired by said plaintiff, on May 1, 1933, subject to encumbrances and mortgages to secure large indebtednesses, the exact amount of

said indebtednesses as of May 1, 1933, is unknown to said defendants; that said debts and mortgages were held by private individuals, the names of whom are unknown to the defendants, and that the said holders thereof are not entitled to have their securities enhanced by tax exemptions with relation to the property encumbered.

(15) For further answer, defendants state that the provisions of the Act of the General Assembly of the State of Missouri, entitled, "An Act to Incorporate the Eliot Seminary," approved February 22, 1853, as set forth in Paragraph 1 of the said Count, and the provisions of the Act of the General Assembly of Missouri, entitled, "An Act to Amend an Act entitled 'An Act to Incorporate the Eliot Seminary,' approved February 12, 1857," as set forth in Paragraph 3 of said Count, did not declare its intention to bind the state or Kansas City never to impose any taxes upon plaintiff, for the reason that no obligations or duties were imposed upon plaintiff, and that there was no consideration for the passage of said Acts, either actual or [fol. 53] expressed, within the terms of said Acts, sufficient to justify a perpetual exemption from taxation; that said Acts contain no provision limiting in any manner the future acquisition of property by plaintiff or any effect upon plaintiff in the acquisition and use of property; that said acts totally ignore any future rights of the state of Missouri, and fail to provide for any advantage to the state and the inhabitants thereof, and that it was therefore not contemplated by the Legisla-ure or by plaintiff at the time said Acts were passed, that the same should be a perpetual exemption or obligatory as a contract upon the state and its inhabitants for all time to come. That said Acts relied upon as contracts by plaintiff granted special advantages to plaintiff to the detriment of the public and should be in law and equity construed strictly against the right claimed by plaintiff. That it was beyond the power of the Legislatures at the time said Acts were passed to sell, give or to contract, or bargain away forever, the taxing power of the state, and that therefore the exemptions claimed by plaintiff do not exist and that to so hold would in no way contravene or be in violation of Section 10, Article I, of the Constitution of the United States, which provides, among other things, that no state shall pass any law impairing in any way the obligations of contracts.

[fol. 54] (16) For further answer, defendants state that it was provided by Chapter 34, Article I, Section 7, of the Revised Statutes of Missouri, 1845, as the same were revised and digested by the Thirteenth General Assembly during the Session of 1844 and 1845, said Act being approved March 19, 1845, as follows:

"The Charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension and repeal in the discretion of the Legislature."

That said law was a general law setting forth the settled policy of the state of Missouri and was in full force and effect in the state of Missouri at the time said Act entitled, "An Act to Incorporate the Eliot Seminary," approved February 22, 1853, was passed; that said Section of said Chapter was carried into and became a part of the Revised Statutes of Missouri of 1855, the same being Chapter 34, Article I, Section 7, and was in full force and effect at the time said Act of the General Assembly of Missouri entitled, "An Act to Amend an Act entitled 'An Act to Incorporate the Eliot Seminary,' approved February 12, 1857," was passed, and that the terms of said Act referring to Eliot Seminary must be construed in conjunction with the previous general law of the state of Missouri affecting said Eliot Seminary and that said Acts affecting said Eliot Seminary, now the Washington University, did not con-[fol. 55] stitute a contract exempting all property thereof from taxation forever, and for the reasons hereinbefore alleged, and the taxation of plaintiff's property by defendants, for such reason in no way is contrary to or in violation of Section 10 of Article I of the Constitution of the United States, in that the same would constitute the passage of a law impairing the obligation of contracts, and these defendants state that to construe said Acts as exempting plaintiff from taxation by Kansas City in view of the terms of said Acts of the General Assembly hereinbefore set out affecting Eliot Seminary and said general law of the state in full force and effect at said time, providing that the charter of any corporation thereafter granted by the Legislature should be subject to alteration, suspension and repeal in the discretion of the Legislature, would constitute the making and enforcement of a law by the state of Missouri which would abridge the privileges and immunities of citizens of

the United States and would be the making and enforcing of a law depriving defendants and Kansas City and the inhabitants of the state of Missouri of property without due process of law, and would constitute the making and enforcement of a law denying to defendants and Kansas City and the inhabitants of the state of Missouri the equal protection of the laws, in violation of the Fourteenth Amend-
[fol. 56] ment of the Constitution of the United States, in the following respects:

In that said Acts affecting Eliot Seminary discriminate against residents of the state of Missouri and in favor of plaintiff and discriminate against nonresidents of the state of Missouri and in favor of plaintiff in regard to the rate of taxation; in that such exemption would increase the burden of taxation on property within the state of Missouri not owned by plaintiff; in that the same relieves tracts of lands owned by plaintiff of the burden imposed by law on other tracts of land owned by citizens of the United States and of the state of Missouri; in that the same constitutes an exercise of the taxing power for a nonpublic purpose in that said Washington University is a private institution and is not under the control of the state or any subdivision thereof.

(17) For further answer, defendants state that it was provided by the Constitution of the State of Missouri of 1820 in Article XIII, Section 19 thereof, "that all property subject to taxation in this state, shall be taxed in proportion to its value." That said constitutional provision constituted a definite prohibition upon subsequent Legislatures in the State of Missouri from passing any Act or Acts exempting the property of plaintiff from taxation, and that said Acts affecting Eliot Seminary aforesaid, now Wash-
[fol. 57] ington University, were void and of no effect and in violation of said constitutional provisions of the Constitution of Missouri of 1820, in that said constitutional provision gave no power to the Legislature to grant such tax exemptions as is claimed by plaintiff and in that said Acts selected plaintiff's property arbitrarily from a class upon which the burden of taxation was imposed by said Constitution, and in that the passage of said Acts attempts to use and put into effect the Legislative power of the state in such a way as to introduce a system of taxation entirely different from that contemplated by said Constitution, and constituted a bartering or giving away of the state's right to

tax property without any consideration and by improper discrimination upon other property owners and other property.

(18) For further answer, defendants state that it was provided by the Constitution of the State of Missouri of 1820 by Article XIII, Section 2 thereof, "that the people of this state have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness."

That said constitutional provision must be construed, if the aforesaid Acts of said Legislatures affecting Eliot [fol. 58] Seminary, now Washington University, be construed to be a contract between the State of Missouri and said Washington University, as an express condition to such contract, that the same was revocable by the will of the people if and when a new Constitution should be adopted which would prevent any such tax exemptions as claimed by plaintiff; that subsequent to the enactment of said Act affecting Eliot Seminary now Washington University, the people of the State of Missouri on July 4, 1865, did adopt and put into effect a new Constitution of the State of Missouri, which provided in Article IV, Section 25 thereof, that the General Assembly shall not pass special laws exempting any property of any named person or corporation from taxation thereby and at said time cancelling any contract between the state and Washington University and declaring at an end any tax exemption theretofore granted to said university upon the abolishment of the Constitution of the State of Missouri of 1820.

(19) For further answer, defendants state that if said Acts affecting Eliot Seminary, now Washington University, should be construed to be valid and binding at the time the same were enacted and accepted by plaintiff, that the same by their express terms only contemplated exemption from taxation of taxes levied by the state at the time said Acts were passed and contemplated only an exemp- [fol. 59] tion from such state taxes; that the tax sought to be levied, assessed and collected by defendants is a tax provided for by the Charter of Kansas City, Missouri, and is a municipal tax on plaintiff's property duly assessed and levied pursuant to a grant of taxing power to Kansas

City by the Constitution and statutes of the state of Missouri.

Defendants further state, that the Constitution of 1820 under which plaintiff claims the Legislatures in passing the aforesaid Acts affecting Washington University, had power to exempt it from taxation, contained no provision in regard to incorporating cities, towns and villages, or for the levying and collecting of any city taxes; that Kansas City as a municipal corporation was without municipal government until February 4, 1850, when the territory embraced within certain plats theretofore filed with the County Court of Jackson County, Missouri, was incorporated by said County Court at Independence under the name and style of the "Town of Kansas"; that the City of Kansas was not incorporated until February 22, 1853, when it was incorporated by a special Act of the Legislature of the State of Missouri; that plaintiff had no property within the limits of Kansas City until long after its incorporation; that all of the taxes which Kansas City could or [fol. 60] might have levied against property originated long after the passage of said Acts affecting Washington University and have originated since said Acts and were not in contemplation of either the Legislature or of plaintiff at the time of the passage of said Legislative Acts affecting Washington University and are therefore not within the terms of said exemption or said contract between the State of Missouri and Washington University, if the same be construed to be a contract.

(20) For further defense, defendants state that if said Acts of said Legislatures affecting Washington University be determined a contract that the same must be construed to be a contract coupled with the condition that only such property should be exempted as might be acquired by plaintiff for its legitimate needs and for the needs of an institution such as was contemplated by the Legislature at the time said Acts were passed, and that it was not contemplated by the State of Missouri and plaintiff at the time of the passage of such Acts that plaintiff might acquire any property beyond its legitimate wants or property such as the property sought to be assessed by defendants in this proceeding, which constitutes property which is merely convenient for increasing the advantages and profits of plaintiff and is held as a mere convenience or in-

cident to the business of plaintiff; that plaintiff for several [fol. 61] years after the passage of said Acts only had four pieces of income real estate not occupied and directly used for school purposes; that at the present time plaintiff owns in the City of St. Louis alone over sixty-two parcels of real estate, all except one of which are income property only; that it owns extensive real estate holdings in St. Louis County outside of the city which have not been taxed; that it owns several tracts of land in Kansas City which are income producing property and other property of large amounts to these defendants unknown in the State of Missouri which are not used for school purposes but which are income producing properties; that since its organization plaintiff has, in addition thereto, received gifts aggregating in excess of $26,000,000; that it receives each year a sum in excess of $1,345,000 from private investments, a sum largely in excess of the amount of the tuitions and fees received by it from students enrolled in said school; that unless a limit is placed upon plaintiff in the acquisition of property not used for school purposes, that there will be no limit to its right of acquisition of property and that it may in the future acquire property beyond its legitimate wants and has at this time acquired this property and other property unknown to defendants in excess of its legitimate wants; that such rights and privileges were never contemplated between plaintiff and the State of Missouri and [fol. 62] that the same situation between the State of Missouri and plaintiff has been changed and altered by the acquisition of such large amounts of property; that unless this Court determine that said property is taxable by defendants that plaintiff will be permitted in the future to acquire large amounts of property, and that plaintiff has been permitted in the past to acquire large amounts of income property exempt from taxation and for the purpose of using the same has been permitted to and will in the future increase the size of its institution so that said added income will be used for operating expenses and thus by constant enlargement perpetuate a wrong upon the State of Missouri and the inhabitants thereof and that therefore said contract must be construed not to include any such privileges or rights in plaintiff for all the reasons heretofore set forth.

(21) For further answer, defendants state that it was not within the power of the Legislatures in enacting said

Acts applying to Eliot Seminary, now Washington University, to relieve plaintiff from the 6th, 7th and 8th Sections of the First Article of the Act concerning corporations, approved March 19, 1845, which general statute sets forth the settled policy of the state within the terms of the Constitution thereof; that to enforce the same, or give any effect to the same, would be in violation of Section 19 of Article XIII, of the Constitution of the State of Missouri [fol. 63] of 1820, providing that all property subject to taxation shall be taxed in proportion to its value, and in violation of Article XIII, Section 2, of the Constitution of the State of Missouri of 1820, providing "that the people of this state have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness," and in violation of the Fourteenth Amendment of the Constitution of the United States for all the reasons set forth in Paragraph 16 of this answer.

(22) For further answer, defendants state that if any force and effect at this date be given said Acts of the General Assembly affecting Eliot Seminary, now Washington University, or if the same be construed to constitute a contract between the State of Missouri and plaintiff, or if the same be construed to constitute a contract between Kansas City and defendants and plaintiff, or if the same be construed to prevent Kansas City from levying municipal taxes upon property owned by plaintiff within the limits of Kansas City, that the same would be in violation of the Fourteenth Amendment of the Constitution of the United States, in that the same would constitute the making and enforcement of a law by the State of Missouri which would abridge the privileges and immunities of the citizens of the United States, [fol. 64] and would be the making and enforcing of a law depriving defendants and Kansas City and the inhabitants of the State of Missouri of property without due process of law, and would constitute the making and enforcement of a law denying to defendants and Kansas City and the inhabitants of the State of Missouri the equal protection of the laws, for all the reasons set forth in Paragraphs 14, 15, 17, 18, 19, 20 and 21 of this answer.

Wherefore, defendants pray that the petition herein be dismissed and for their costs.

Count II

For answer to the Second Count of plaintiff's petition, defendants repeat and incorporate by reference with the same force and effect as if actually repeated herein the allegations and averments set forth in all paragraphs or sections of the answer to Count I of plaintiff's petition.

Wherefore, defendants pray that said count may be dismissed and that it may have its costs herein expended.

Count III

For answer to the Third Count of plaintiff's petition, defendants repeat and incorporate by reference with the same force and effect as if actually repeated herein the allegations and averments set forth in all paragraphs or sections of the answer to Count I of plaintiff's petition.

[fol. 65] Wherefore, defendants pray that said count may be dismissed and that it may have its costs herein expended.

Count IV

For answer to the Fourth Count of plaintiff's petition, defendants repeat and incorporate by reference with the same force and effect as if actually repeated herein the allegations and averments set forth in all paragraphs or sections of the answer to Count I of plaintiff's petition.

Wherefore, defendants pray that said count may be dismissed and that it may have its costs herein expended.

Count V

For answer to the Fifth Count of plaintiff's petition, defendants repeat and incorporate by reference with the same force and effect as if actually repeated herein the allegations and averments set forth in all paragraphs or sections of the answer to Count I of plaintiff's petition.

Wherefore, defendants pray that said count may be dismissed and that it may have its costs herein expended.

George Kingsley, City Counselor; Marcy K. Brown, Jr., Assistant City Counselor, Attorneys for Defendants.

[fol. 66] RECITAL AS TO TRIAL, ETC.

Thereafter and on the 26th day of January, 1940, this cause came on regularly for hearing and the parties appearing by their respective attorneys, the cause was submitted to the Court upon pleadings and evidence adduced and was by the Court taken under advisement, and on the 24th day of February, 1940, the Court rendered judgment, which said judgment is fully set out in the Bill of Exceptions filed and allowed and made a part of the record herein.

[fol. 67] IN CIRCUIT COURT OF JACKSON COUNTY

Bill of Exceptions on Behalf of Defendants

Be It Remembered, That on the 26th day of January, 1940, the same being the 17th day of the regular January, 1940 term of said Circuit Court, this cause coming on to be heard before the Honorable Paul A. Buzard, Judge of said Court, without a jury, the plaintiff appearing by its attorneys, Messrs. McCune, Caldwell & Downing and specially by Mr. Harold N. Noble, the defendants appearing by their attorneys, Mr. Roy B. Cunningham and Mr. Elmo B. Hunter, the following proceedings were had and entered of record on said day and the days hereinafter mentioned, to-wit:

Thereupon the plaintiff, to sustain the issues on its part, offered and introduced evidence, oral and documentary, as follows, to-wit:

Mr. Noble: Before we get started, plaintiff asks leave to amend the petition by substituting H. J. Gorman for Maurice Carey, as City Treasurer, and the City enters the appearance of H. J. Gorman and files Answer for him.

It is agreed that *that* all net revenue derived from the three properties in Kansas City and described in the petition enter the general expense fund of The University and are devoted to educational purposes of the school.

Mr. Cunningham: Wait a minute. Well, that is a fact, isn't it?

[fol. 68] Mr. Noble: Yes. It is agreed that the City Treasurer, unless enjoined, would have proceeded and will pro-

ceed to enforce payments of the general taxes against and out of the respective properties of the plaintiff.

It is agreed that the transcript of the testimony in evidence in the suit of Washington University against Koeln, being the transcript involved in the case reported as Washington University versus Baumann, as Substitute Collector——

Mr. Cunningham: Mark it as an exhibit right now and put it in.

(The document last above referred to by Mr. Noble was thereupon identified by the reporter as Exhibit No. 1, was received in evidence, and is in words and figures following, to-wit):

EXHIBIT 1

Direct examination.

By Mr. Williams:

My name is Joseph H. Zumbalen. I live in University City, Missouri. I am secretary and treasurer of Washington University, the plaintiff, and have been such since February 1, 1925. I have in my custody and possession all of the records of the University. I have lived in St. Louis all of my life. I have all the records of the University from the beginning, the original record books and minutes of the Board of Directors from the very commencement. I have examined these record books and have made a copy of the proceedings shown therein, with respect to the action taken by the incorporators with reference to organization under [fol. 69] the acts which have been offered in the evidence.

The first record book begins with the meeting of February 23, 1854, which was just one year after the Governor approved the Act incorporating Eliot Seminary, and it shows that ten of the incorporators named in the original Act of February 22, 1853, met, in pursuance of written notice served on all of them, at Wayman Crowe's residence, and agreed to organize under the Act. That Samuel Treat and William G. Eliot, two of the incorporators, submitted a so-called constitution, which, after consideration, was adopted. The first article of said constitution is as follows: "This corporation is organized for the purpose of founding an educational institution under the Act to incorporate Eliot

Seminary, approved February 22, 1853, which institution shall be known and designed as —." I may say that there was, from the start, the question as to whether they wanted to use the name of Eliot Seminary, so they left that blank. "The object of the institution shall be to provide means of a thorough and complete education, with particular view to practical usefulness." A president, vice president, treasurer and secretary were also elected at that meeting. The records further show that, at a meeting of the corporation held on January 12, 1857, the following resolution was adopted: That the subject of the change of name of Eliot University to Washington University and also the incorporation of Article VIII of the constitution, which had been adopted in 1854, into the Charter, and also vacating [fol. 70] the alley and prohibiting the opening of any street or streets, be referred to a committee consisting of Messrs. Gantt, Treat, and the president. At a meeting held March 24, 1857, the committee appointed on January 12, 1857, reported that pursuant to the views of the Board, a bill to amend the charter of Eliot Seminary was prepared and submitted to and passed by the General Assembly, and received the Governor's approval. Said amended charter is as follows, and then it is set out in full, and is in the printed copy I furnished to Your Honor. Whereupon, the following resolution was adopted: Resolved, that said amendment to the charter of this corporation, be accepted.

Q. Have you a certified copy of those minutes?

The Court: Let me interrupt you just a moment. What is the contest here? I suppose there is an answer? What is it?

Mr. Burkhardt: Yes.

The Court: The answer contends, I suppose, that on the facts, whatever they may be, that Washington University is not exempt from taxation?

Mr. Burkhardt: Yes, that is one of the allegations. Another allegation in the answer is the fact that plaintiff did not pursue its remedy at law, by appealing from this assessment to the local Board of Equalization, and thence to the State Tax Commission, and they are not entitled to consideration at the hands of a Court of Equity, because they had an adequate remedy at law. Further, the contention is made that there are certain mortgages, or a certain

[fol. 71] mortgage, upon some of the income producing property, held by individuals, and by reason of the exemption or claimed exemption, that mortgage is enhanced and benefit is given to a third party, not a party to this litigation here.

The Court: What taxes are involved; real estate or personal?

Mr. Burkhardt: Real estate taxes on about eighty or ninety pieces of property.

The Witness: Real estate taxes only upon what we call productive investments; none on the University or educational buildings, or campus property.

The Court: Is the University campus and other property, is that exempt? Or, does the City try to collect taxes on it also?

Mr. Williams: Most of the campus is outside of the City in the County, but there has been no attempt to levy taxes on that property.

Mr. Burkhardt: There has been no attempt to levy an assessment against the Medical School or the property in the City.

The Court: Then, these taxes that are involved in this suit, are taxes on property that the University owns, which Mr. Zumbalen says is producing revenue.

The Witness: Yes, or may produce revenue. Some of it is unproductive at present, but it is in that class. Here is a certified copy of the minutes.

Mr. Williams:

Q. You have made this copy from the original record of which you spoke?

A. From the minute book.

[fol. 72] Mr. Williams: I ask to have the copy marked as "Plaintiff's Exhibit 1." I offer them.

Q. What do you know of the organization of the University and of its conduct as an educational institution, from and after these Acts constituting its Charter that you have spoken of?

A. Well, after the organization of the incorporators, and acceptance of the Charter, they proceeded to immediately engage in educational work. First of all, they started a so-called Trade School, and then an Academic Department,

and the immediate result of that was that they acquired property on 17th and Washington avenue, on the southwest corner, and the original buildings were erected there. They solicited subscriptions from among their friends, and the incorporators themselves contributed liberally to a fund to purchase a site and for a building fund, and in addition to the Academic Department, one of the first undertakings was to establish a female seminary that was organized and in operation before 1860, I think, and has been known ever since as Mary Institute. From time to time other departments were added to the University until—its growth during early years, of course, was not rapid, but now there are some—oh, I have forgotten to bring the bulletin—but I think seventeen or eighteen different departments.

Q. About when was this educational work that you speak of begun, according to the records of the University?

A. It was begun in the late 50's. It really commenced about 1858. I do not think that the first class graduated as early as 1857, because that would have meant that the [fol. 73] academic department started as early as 1854, which I do not think it did, but the academic department was certainly organized and in operation before 1857. If this is material, I can get those dates, of course.

The Court: It is only material as pertaining to the history of the University, that is about all.

Mr. Zumbalen: The university has operated, according to my examination of the records, every year since then as an educational institution.

Q. When was the University moved from its original site at 17th and Washington avenue to its present quarters?

A. Well, it was not actually moved until after the close of the Louisiana Purchase Exposition, that is, 1905. The original group of buildings was erected before that time. We started building in 1900, I think, and then there were four or six buildings completed, which were leased to the Louisiana Purchase Exposition Company for the period of the exposition. After the close of the exposition, which was closed in December of 1904, the University moved out to the present location.

Q. Where is the present location?

A. On the west side of Skinker Road, extending from the railroad tracks on the north to Forsythe on the south, and then south of Forsythe there is an additional—that tract

covers about one hundred and fifty acres, and there is an additional tract of about forty acres between Forsythe and Wydown, fronting on Pennsylvania avenue, which is now known as Big Bend road.

Q. How is this——?

A. Pardon me. In addition to that, there is the medical [fol. 74] group, located on Kingshighway and Scott avenue —Scott and Euclid avenues. The medical school is located there, 4580 Scott avenue. The dental school at 4557 Scott avenue, and the medical clinic on the west side of Euclid, just south of the Wabash Railroad tracks, and the Oscar Johnson Institute on the northwest corner of Euclid and Kingshighway, running east and west.

Q. This Institute, is that a part, or associated with the Medical Department?

A. The Oscar Johnson Institute, yes. The Oscar Johnson Institute and the McMillan Hospital are parts of the University.

Q. That Institute is for the treatment of all diseases of the eye?

A. Yes, eye, ear, nose and throat.

Q. Now, this present campus building, or quarters of the University, is that improved?

A. Yes, sir.

Q. To what extent, and, generally, how?

A. There are quite a number of buildings there. The easternmost buildings are two fronting on Forsythe, and immediately west of Skinker road, the one next to Skinker road being the School of Fine Arts, and west of that is the Givens Hall of Architecture. Those two buildings, at least, the School of Fine Arts and part of the Givens Building, are in the city. That is, the limits line runs through that building. Everything west of that is in the County, not in any municipality. Taking the buildings west of that, there is Brookings Hall, the first to the east. North of that is Cupples No. 1, and south of Brookings Hall is Cupples No. 2—no, south of Brookings Hall is Bush Hall. Cupples No. 1 [fol. 75] is engineering, and Bush Hall is chemistry; and west of Brookings, and running parallel to it, these buildings, Bush Hall and Cupples No. 1, are on an east and west axis, and Brookings and the library buildings are on a north and south axis. Then, to the north of Ridley Library is the Duncker Hall of Commerce & Finance; to the south of that is the Grace Valle January School of Law building,

and immediately southwest of the January Hall is the Newton K. Wilson Hall, which is devoted to or is the house of the Department of Geology; and immediately west of that is the Charles Rebstock Hall, occupied by the Department of Biology. Then, west of Rebstock Hall are two men's dormitories, Lee Hall and Liggett Hall. To the north of Lee Hall is the Graham Chapel, and on the north side of the campus, west of Cupples No. 1, is Cupples No. 2, also devoted to engineering. The power house is north of that and immediately adjacent to the railroad tracks. Then, a little farther west, on the north side, is the women's building, and west of that is McMillan Hall, the dormitory for women. Then comes, on that side of the campus, a group of eight Fraternity Houses.

Q. These buildings that you speak of, they are maintained and kept up by the University, are they?

A. All of them, excepting the Fraternity Houses. We have nothing to do with those, excepting that we furnish a building site for them, and lend them money.

Q. Has the University built up any libraries and equipment?

A. A vast amount of equipment and large libraries. Our [fol. 76] central library is in Ridley Hall, the building which parallels Brookings Hall, on the west side of the original quadrangle, and it is considered a very valuable library, for a college library. Then, in addition to that, the departments have libraries of their own. The Law School Library, I suppose, now comprises over forty thousand volumes. The Medical School has a large library, and the Dental School has a considerable library, the Chemistry Department, Biology Department. Art School and Architecture, all have libraries of their own, devoted particularly to the subjects which they teach, located in those buildings.

Q. Now, does the University, and has the University, for a good many years, employed professors and instructors?

A. Yes, from the very beginning. I think the present number is, oh, considerably over five hundred—nearer six hundred.

The Court: In all of the schools?

A. Yes, sir.

Q. And those professors and instructors, of course, have to be paid?

A. They are all paid by the University.

Q. And, about how many students has the University at present, Mr. Zumbalen?

A. Well——

Q. —to whom it is furnishing instruction, in one way or another?

A. I can give you the figures on that, and show the comparative growth, if you wish. I cannot give you the figures for the present year, because they are not complete. I have the figures for different periods between 1910 and the present time. 1910-1911, we had 1802 students; 1915-1916, [fol. 77] 2196 students; 1921-1924, 4471 students; 1925-1926, 6195 students; 1930-1931, 7915 students; 1932-1933, 7313 students. There was a drop in the last few years. This year we will show a further drop. I have looked into the last figure I gave a little more closely, and the figure for 1932-1933, the total was 7313, of whom 3012 came from the City of St. Louis, and 1824 from the rest of the State of Missouri. Of course, we have quite a number of students from different parts of the country, but that is a fair illustration of the distribution.

Q. Now, what professional schools does the University maintain, along with the regular Academic School?

A. The School of Medicine, School of Law, School of Dentistry, and School of Fine Arts.

Q. You have a School of Commerce & Finance?

A. School of Finance & Commerce.

Q. You have engineering schools?

A. Well, that is a Department, although we do call that a school now, too. The Engineering School and School of Architecture.

Q. Electrical engineering?

A. That is divided into the electrical engineering, civil engineering and mechanical engineering.

Q. Now, the University has, has it not, a large amount of practical and scientific equipment and apparatus?

A. A very large amount, yes.

Q. That is being maintained, and is being added to all the time?

A. Yes, and replaced all the time. Equipment wears out, and has to be replaced ever so often.

[fol. 78] Q. The University also maintains, in addition to these schools you have mentioned, extension courses?

A. Yes, sir.

Q. What do you mean by that?

A. Well, the extension division has what is called Saturday morning work and night work during the week.

Q. What is the purpose of that work?

A. The purpose is to enable young people who cannot go to the University proper or to college, to get some of the work that is done in the college. Now, the extension division was reorganized about two years ago, so as to permit the work done in the extension division—to give credit; rather, for the work done in the extension division, so if the students who take that work are afterwards able to enter college, they can get credit for the work in the extension division.

Q. And if they do not want to enter college, they are enabled to take advantage of their acquaintanceship with these subjects they have studied for practical purposes; is that true?

A. It is, indeed, true. The fact of the matter is, with respect to the extension division, that a great many employers urge their employees to take the work there, and even help them to take it.

Q. Mr. Zumbalen, what is the annual expenses to the University of operating all these activities that you have described, in the conduct of these schools?

A. The expenses for the year 1932-1933, that is, the year ending June 30, 1933—I'll give you the figures—the expenses of the schools during that year were $2,138,121.45.

Q. Now——

A. Do you want it for the year before also?

[fol. 79] Q. Yes, because that is the year I referred to in this petition?

A. For the year ending June 30, 1932, it was $2,363,573.55.

The Court: In that connection, if you have it there, what were the total receipts for that year?

Mr. Williams: Could he divide that into two parts?

The Court: Yes.

Mr. Williams: Receipts from tuition and receipts from income?

The Court: All right, if he has it that way.

The Witness: The income from investments was $1,345,449.94; the income from schools—that means, of course, tuition and fees—was $1,137,294.38.

The Court: What year is that?

A. The year ending June 30, 1932. Now, for this year, or last year, ending June 30, 1933, the income from investments was $1,146,636.74, and from schools, was $1,102,126.22.

Q. Now, this money that you got from various sources, what did you do with it?

A. It is all applied and spent in running the schools; every dollar of it. Sometimes the operations for the year show a deficit; sometimes, they show a surplus. In any event, the deficit or surplus is very small, and never exceeds $2,000 or $3,000. If it is a surplus, it is carried forward to the income of the succeeding year; if it is a deficit, it is made up out of the income of the succeeding year. We are enabled to run pretty close in that way, because we run on a budget, which is changed from time to time, during the [fol. 80] year, as exigencies require. If it appears during the year that our budget will not work out, that we will run short, we will curtail wherever we can during the balance of the year, to live within our budget. The surplus that is shown at the end of the year by our balance sheet, the profit, is never carried into a surplus account.

Q. According to your examination of the records and books of the University, has that always been true?

A. Yes, that has always been true, excepting that, in the earlier days, there was practically always a deficit. That was usually made up by members of the corporation. I know that for the first fifteen or more years of the Law School's existence, which started in 1867, there was a yearly deficit running from $3,000 to $5,000, which Mr. and Mrs. Henry Hitchcock made up yearly. One or the other made it up yearly for fifteen or more years. The same was true of the balance of the University, until about 1898, when Mr. Brookings, who was then president, insisted there must be no more deficits. He made up the deficit for the prior year personally, and it amounted to some $10,000 or $12,000, as I recall. I cannot be positive about these figures. He then put into operation the present budget system, which has prevented deficits of any large amounts.

Q. Roughly speaking, can you state to the Court about how much the entire expense per student compares with what the student pays in?

A. Taking the students in all departments, and averaging them, the University spends nearly twice what the student [fol. 81] pays in. In other words, in most of the depart-

ments, the tuition is $250 per year. It costs the University very nearly $500 per year to carry every student. In some departments, in the Art School, the tuition is very much less. In the Medical School, it is very much more. It is $400 per year, but the actual cost to the University, per student, is over $1,900 per year.

Q. For every medical student you train, you spend $4.50 to his $1.00?

A. Yes, sir.

Q. Now, Mr. Zumbalen, does the University have any scholarships? Has it maintained scholarships?

A. Yes, it has from the start maintained some, and the number is increasing all the time.

Q. Can you state to the Court the situation with reference to scholarships at present, and give the Court some idea of the number of scholarships maintained by the University for deserving and worthy students, and about what they cost?

A. Yes, I can. In the year 1932-1933, that is, the year ending June 30th of last year, we distributed to students scholarship fellowship funds amounting to $40,066. That is, income for endowments given for that purpose, in addition to a large number of free scholarships. We also have a number of loan funds, out of which we make loans to worthy and deserving students, and last year these loans, the income so used from loan funds, was just short of $18,000. Now, I'll give you also the amount of free scholarships. Free scholarships last year amounted to $50,225. That is, scholarships for which the University gets not a cent from anybody. All that was given to worthy and deserving [fol. 82] students who show unusual qualifications for the work.

The Court: Are these scholarships paid out of the funds of the University, or are they paid out of donations from endowments?

A. No. The figure $40,000 represents scholarships for which we have endowments, that is, the income from the endowment fund. This $50,000 that we awarded last year, we have no endowments for that, and it comes out of the University's income.

Q. How do you select these students that get these free scholarships?

A. They are selected by the Chancellor, co-operating with the deans of the departments in which they want to register, and they are based upon the intellectual qualifications of the student and his financial needs and general character.

Q. So that those are open to anybody that can measure up to his deserts in that regard?

A. Yes, excepting that there is another limitation upon the division, in this respect: We give a certain number to each of the high schools in the City of St. Louis, and we give a certain number to each of the Kansas City high schools, and to various other high schools throughout the State. That is another limitation.

Q. You do that as a means of general selection?

A. Yes, sir.

Q. Leaving it to those local schools of good standing to weed out promising candidates for education?

A. Exactly.

Q. Mr. Zumbalen, how has the University gotten this money?

A. Altogether by gifts from friends and public-spirited [fol. 83] citizens who realize the value of education; but, I might say, the original start, the beginning, was entirely due to the gifts made by the original incorporators. For some considerable period of time, there were no gifts received from outside sources.

Q. If I understand you then, the original incorporators were the ones who started the school and kept it going for a while by their own gifts?

A. Yes, sir.

Q. As the school has grown and increased in size and reputation, your list of donors has enlarged?

A. Very much so, indeed. I have prepared a list from the records, and taken off all donations in excess of $25,000 that the University has ever received. I would not be sure that this includes everything, because——

Q. I do not think we care to go especially into that, unless you desire to do so. I am concerned, principally, with this property in question in this case.

A. Well, I would be glad to submit this list of donations.

Q. I should like to ask you particularly about one or two matters in that connection. A very large portion of your estate, the Medical School and its endowments, where does that come from?

A. From the General Education Board.

Q. What is that?

A. That is an eastern foundation which has been helping, devoting itself principally to the advancement of medical education.

Q. Who was it founded by?

A. Do you know—was it the Rockefeller foundation?

Q. They have made very large donations to the Medical School, haven't they?

[fol. 84] A. Yes, we have received from the General Education Board, $7,519,765.

The Court: All together?

A. Yes.

Q. Do you know whether any representation was made to them as to the exempt character of the property of the University?

Mr. Burkhardt: I object to that as immaterial and irrelevant, any representation that may have been made to a third party.

The Court: I'll hear it.

To which ruling of the Court the defendant then and there duly excepted.

A. Why, I can't answer that, Mr. Williams. I never, personally, dealt with any representative of the General Education Board. I would like to state, that while the General Education Board's contribution is quite large, there are others that are rather surprising, among them, that of Mr. Robert S. Brookings, who became president along about 1892 or 1893, whose total contribution amounted to $3,690,000.

Q. Mr. Brookings was one of the great benefactors of the University, both in a money way and executive way?

A. Indeed he was. He really started the University on its great career.

Q. Mr. Brookings and Mr. Nagel and Mr. Eliot are responsible for the modern institution known as Washington University, aren't they?

A. They are, for the modern institution. At the same time, I feel we cannot forget the old times, when the struggle was hardest of all.

Q. All right. You may indicate some others?

A. Mr. Samuel Cupples, $1,925,000; Mrs. Eliza McMillan, $1,315,000; Charles Rebstock, $1,008,000; Joseph B. Givens, [fol. 85] $765,000; W. K. Bixby, $603,000; Edward Mallinckrodt, $974,000; Mrs. Sarah Glasgow Wilson, $991,000.

Q. Does the University pay to its trustees or officers, apart from its officers who direct the management and instruction, any salary or compensation?

A. The directors or members of the corporation do not get any salary or remuneration whatsoever.

Q. Mr. Zumbalen, we have here quite a list of pieces of property. I have here, may it please the Court, the original tax bills concerned here, which were made out and delivered to the Collector, the defendant in this case, for collection. I take it that they may be shown as offered in evidence, but I do not want to leave the tax bills here. They are in public custody and have to be held there, and I will replace them with correct copies.

Mr. Burkhardt: I believe the copy attached to the petition is a correct copy. There has been one bill that has been divided since.

Mr. Williams: Well, I think that we can do that. We will call Your Honor's attention to the fact that attached, as exhibits to the petition, are copies of these tax bills, which are correct.

Mr. Burkhardt: Yes.

Mr. Williams: And which are the tax bills here in question, and while I am offering the tax bills, it is understood that I will actually offer in place of the originals, these that are annexed as exhibits to my petition in this case.

The Court: That is all right.

Mr. Burkhardt: There may be one correction. One bill has been split into two bills.

[fol. 86] The Court: What is the aggregate amount of them?

Mr. Burkhardt: About $175,000. That does not include interest and penalties.

The Court: Are they all for the year 1931?

Mr. Burkhardt: 1932. They were assessed as of June 1, 1931.

The Court: Does Mr. Zumbalen know the character of property?

Mr. Williams: I am going to ask him about it right now. May it please the Court, I offer in evidence the exhibits attached to the petition, which are agreed, with the exception of Exhibit "E", to be correct copies of the tax bills issued and outstanding. Exhibit "E" has been split, for purposes of convenience of the administration—possibly on request of someone interested in the property, into three separate tax bills. Those three bills I'll offer in evidence, and will add copies to the record later.

Mr. Burkhardt: That is all right.

Said exhibits offered in evidence.

Q. Now, Mr. Zumbalen, I'll call your attention to the tax bills or to the property that is listed in these tax bills.

A. Do you want me to go through them all, item by item?

Q. I am afraid so. Can you just indicate—I don't think we need to go into that.

The Court: I would like to know whether the property is industrial property or manufacturing property or residence property, or what not.

Mr. Burkhardt: You can probably tell better from the petition than from the tax bills.

[fol. 87] The Witness: I would think so.

Q. I want to ask you whether the property we are talking about in these tax bills, was all property that was owned by Washington University of record on the first of June, 1931?

A. Yes.

Q. Will you go ahead and bring out what the Court has in mind; the character of the property?

Mr. Burkhardt: That will include all property so acquired, and the character of its use at the present time. I would like to have the dates, if you have them.

The Witness: I can give that, yes. Item No. 1 is a parcel on Second street, Block 27. That was acquired by deed of gift from Henry Shaw, as an endowment for the School of Botany, July 23, 1885.

Q. What kind of property is it?

A. That is business property. It is now vacant. It was occupied for years by the Illinois Glass Company.

Q. All right; go on?

A. The next piece is a lot on Second street, in Block 63, 68 feet, 9¾ inches on Second street. That was acquired by gift from Robert S. Brookings on May 12, 1899. That also is industrial property—warehouse property. No. 3. A lot of ground on Third street, City Block 66, frontage of 18 feet, 9 inches, by 100 feet, 7½ inches, acquired by deed of gift from Joseph B. Givens on November 17, 1930.

The Court (Q.): Do these deeds indicate any specific purpose in the gift?

A. Some of them do; not all of them. For instance, on the first parcel from Henry Shaw, that was given as an [fol. 88] endowment for the Shaw School of Botany. Most of them do not. No. 4 is a lot of ground on Broadway, City Block 118, 29 feet, 10 inches, by a depth of 127 feet, 6 inches. No. 5 parcel is grouped with that.

Mr. Burkhardt: What kind of property is the fourth piece?

A. Industrial business property. And the 5th, on St. Charles street, thirty feet on the south side of St. Charles street. Those two pieces were acquired on February 9, 1928, by way of exchange for the southwest corner of Locust and 29th street, property belonging to the University, which had been occupied by the Dental School up to the time the new building on Scott avenue was erected. That was a clear exchange. No. 6, a parcel on Elm street, City Block 134, fronting 135 feet by 100 feet, industrial property, acquired by purchase from Samuel Cupples Real Estate Company, December 23, 1911.

Q. You say that was acquired by purchase?

A. Yes.

Q. From what?

A. From the Samuel Cupples Real Estate Company.

Q. Where did you get the money?

The Court (Q.): What was the consideration?

A. I can't tell where the consideration came from. The University furnished it.

Q. That is business property?

A. Yes, sir.

Q. Go on?

A. No. 7, a lot on Sixth street, City Block 146, lot 16 and part of lot 15, acquired by purchase from Nathan Jacobs and Ellen Durning in June, 1902. No. 9, lot on Washington avenue, being lots 2 and 3, in City Block 178——

[fol. 89] Q. Have you finished with 6th street, or does your order change?

A. I am following the order given in the petition before the Tax Commission.

Q. Didn't you leave out City Block 162 on Sixth street?

A. Did I leave that out? No. 8, I skipped that for the present, and I'll come back to it in a moment. No. 9, a lot on Washington avenue, in City Block 178, being lots 2 and 3, acquired by purchase from Robert Brookings.

Q. Your order is different there?

A. I'll come back to No. 8 in a moment.

Mr. Burkhardt: I have No. 9 different too.

The Witness: I changed the order simply because I am grouping them where I can.

Q. All right; go ahead?

A. No. 9 was acquired—that is on Washington avenue——

Q. City Block what?

A. 178. That was acquired by purchase from Robert S. Brookings July 13, 1899.

Q. What is the character of the property?

A. Business property.

Q. All right.

A. Now, No. 8, which is in Block 162, being lots 6 and 7 on Sixth street. No. 10, in Block 187——

Q. Wait a minute.

A. No. 10——

Q. The order is different. I have a lot or parcel on 6th street, lots 6, 7 and 8—that is No. 8. Now, what street is the next one on?

A. Spruce street.

Mr. Burkhardt: I do not understand how parcel 8 was acquired.

Mr. Williams: We have not come to 8 yet.

[fol. 90] The Witness: Well, I'll give you parcel 8. That was acquired by purchase from—no, that was a gift.

Q. A gift from whom, and when?

A. Samuel Cupples and Robert Brookings, the conveyance being executed by St. Louis Terminal Cupples Station & Property Company, of which Mr. Cupples and Mr. Brookings owned all the stock, dated May 29, 1900. Now, parcel 10, on Spruce street, in City Block 187, was acquired by the conveyance last referred to. Also parcel 11.

Q. Now, what block is that in?

A. That is on 8th street, city block 187.

Q. Lot 4?

A. Lot 4, city block 187.

Q. All right. What is next?

A. The next is 12, which is on 7th street, City Block 417, frontage of 400 feet, by deed last referred to, Cupples Station Property Company. Also lot on 9th street, in City Block 417, having a frontage of 200 feet; acquired by the same conveyance on the same date. Also, lot on Spruce street, City Block 417, having a front of 145 feet, acquired on the same date by the same conveyance. Now, I am skipping again. Also, lot on Ninth street, in City Block 425——

Q. Just a second now.

A. How?

Q. Just a moment. 455?

A. 425.

Q. All right, go ahead?

A. Ninety-seven feet on Ninth street, by the same conveyance, from St. Louis Terminal Cupples Station; 97x127.

Q. That is a frontage of 97x102?

A. 97x127.

Q. All right; I have it.

A. Now, a lot on 9th street, City Block 427, fronting [fol. 91] 200 feet on Ninth, by a depth of 127. That is also covered by the conveyance from the St. Louis Terminal Cupples Station & Property Company. A lot on 9th street, City Block 427, fronting 200 feet—did I give you that?

Q. Yes, you gave that, 200 feet on Ninth street.

A. Well then, I'll give you the next parcel on 10th street, City Block 434, frontage of 200 feet by 127 feet deep, covered by the same conveyance. Now, a lot on 10th street, City Block 435, frontage of 145 feet by 127, also covered by the same conveyance. A lot on Clark avenue, City Block 435, frontage of 105 feet, depth 120, by the same conveyance from the St. Louis Terminal Cupples Station & Property Company, dated May 29, 1900. Next a lot of ground on Spruce street, City Block 425, frontage of 48 feet, 9 inches, and a lot on Spruce street, City Block 425, with a frontage of 53 feet——

Q. Nine inches?

A. Nine inches. Acquired by deed of gift from Robert S. Brookings, dated January 27, 1911.

Q. Yes.

A. A lot on Clark avenue, City Block 425, having a frontage of 75 feet, by 120, and a lot on 8th street, in City Block 425, having a frontage of 20 feet by 102.

Q. Wait a minute. 8th street?

A. City Block 425, frontage of 20 feet, by 102.

Q. All right?

A. Acquired by purchase on August 10, 1916, from Blanche V. Dillon and others.

Q. That is two parcels in City Block 425, one on Clark avenue with a frontage of 75x120, and the other parcel is on 8th street, having a front of 20 feet by 102, in City Block 425?

[fol. 92] A. Eighth street, a front of 20 feet, yes. That's all right. The next is a lot on Clark avenue, city block 425, with a frontage of 80x120, acquired by purchase September 2, 1916, from St. Louis Union Trust Company, a trustee of Dexter Tiffany. Now, a lot of ground on Clark avenue, city block 425, frontage of 90 feet on Clark, by 120 feet, acquired by purchase July 3, 1919, from Columbia Transfer Company.

Q. Yes. A lot on 10th street, city block 427, front of 200 feet by 127, acquired by purchase February 27, 1922, from Tiffany Real Estate Company. A lot on Olive street, in city block 509, a frontage of 25 feet by 69 feet.

Q. Can you look at the description there? Is that part of lot 18 and part of lot 19?

A. I suppose it is.

Q. 25x69?

A. Yes, sir. And then the property immediately to the west, being lots 20 to 23 on Olive street, in the same block 509, acquired October 4, 1929, from A. J. Goedde, in exchange for lots 18 and 19, 20, 21 and 22, in city block 897, fronting 125 feet on the south line of Locust street.

Q. In exchange for other property?

A. Yes. A lot on Washington avenue in city block 521, having a front of 106 feet, 11½ inches——

Q. Is that 521 or 531?

A. 521.

Q. Having a frontage of what?

A. Frontage of 106 feet, 11½ inches, by 132. Acquired by purchase from Patriot Realty Company, February 27, 1920. A lot on Washington avenue, in city block 522, E, with a frontage of 65 feet, 5 inches, by a depth of 132

[fol. 93] feet, acquired by purchase from St. Louis Provident Association, June 1, 1910.

Q. All right.

A. Lot on Locust street, in city block 829, fronting 275 feet by a depth of 155.

Q. All right.

A. Acquired by purchase from Olive—no, I would say Clove Realty Company, on May 12, 1909. A lot on Washington avenue, city block 834, a frontage of 78 feet, 9¼ inches, by 150 feet.

Q. Wait just a moment, please sir.

A. That is the northeast corner of 17th and Locust, Robbin's Lane and Locust.

Q. City block what number?

A. Locust street; city block No. 829.

Q. I thought you said Washington avenue?

A. I haven't given you that yet. Washington avenue, block 834, frontage of 178 feet, 9¼ inches, by 150, lots 1 to 3 and the eastern part of lot 4, acquired in May, 1899, by purchase from A. F. Ghio and others. There were three other grantors.

Q. All right, sir.

A. Lot on Locust street, city block 898, with a frontage of 250 feet by 155⅛ inches.

Q. Yes.

A. Of that parcel, the western 150 feet on Locust, running eastwardly from 19th, was a gift by Wayman Crowe and wife to the University as an endowment for the St. Louis School of Fine Arts, made June 5, 1879. The eastern 100 feet of that parcel was acquired by purchase, 50 feet on April 3, 1882, and the remaining 50 feet, March 7, 1884.

Q. Do you know what that 250 feet was used for?

A. Well, the 150 feet which was a deed from the Wayman Crowes, was the site of the old Memorial Hall, which Way-[fol. 94] man Crowe built as a memorial to his son, Wayman Crowe, Jr.; and as the deed said, it was given as an endowment for the School of Fine Arts; and the 100 feet east was acquired by the University as additional space for the School of Fine Arts.

Q. And was long occupied for that purpose?

A. Yes, and after the School of Fine Arts moved to the present campus, that group of buildings was destroyed by fire, and it is now the site of the Weber Implement Com-

pany on 19th and Locust street. Lots 45 to 54, inclusive, city block 929, with a frontage of 250 feet on the north line of Locust street, by 134 feet, 5 inches, acquired on June 1, 1855, by the University by purchase from Devereaux Bellemont.

Q. That was the parcel where the original University buildings were situated and long maintained, weren't they?

A. No. That is the location of the second Mary Institute building; and during the period of the World's Fair, after the University had leased the new buildings on the present campus to the Louisiana Purchase Exposition Company, the University occupied the old Mary Institute buildings on 27th and Locust street for a year or possibly more, until they moved out to the present campus.

Q. This piece of property you described on Locust street was occupied for many years by the Mary Institute department of the University?

A. Yes, that was the second home of the Mary Institute. The first home was on Locust just west of 14th street, where the Young Women's Christian Association building [fol. 95] stands now, and after the Mary Institute moved to 27th street, that building on Locust and 14th was occupied by the Law School.

Q. From this place at 27th and Locust, after many years, the Mary Institute moved still farther west?

A. Out to Lake, between Waterman and Westminster.

Q. And later, the Mary Institute moved again did it?

A. Yes, they moved to Warson and Ladue road.

Q. It received quite a large endowment for the new plant there?

A. Yes, Mrs. Sarah Glasgow Wilson gave $500,000 in cash for the new building, besides the larger part of the ground. Now, a parcel on Washington avenue, in block 2006, fronting 75 feet by 136 feet, 4 inches, acquired from the Burdeau Real Estate Company on December 28, 1929, in exchange for a large number of unimproved lots in the City of St. Louis and in Oklahoma City, Oklahoma, of which the University was equitable owner, the legal title to the lots being in the Avenue Corner Realty Company, all the stock of which the University had acquired by gift under the will of George Warren Brown.

Q. This was exchanged for that gift property?

A. Yes.

Q. Go ahead.

A. Undivided half interest in lot on Papin street, block 2234, with a frontage of 65 feet by 135 feet. I am grouping again a number of parcels which I will give you. Undivided half interest in lot on Papin street, in block 2234, with a frontage of 100 feet by 135 feet; also an undivided [fol. 96] half interest in lot on Minnesota avenue, in city block 2916, frontage of 25 feet by 127 feet; also undivided half interest in a lot on Enright avenue, in city block 3753, having a front of 28 feet by 155 feet; also undivided half interest in a lot on Ivanhoe avenue, city block 4812, lot 10.

Q. Just a minute now.

A. 50 feet by 150. Also an undivided half interest in Ivanhoe—a lot on Ivanhoe avenue, in city block 4813, and the north part of lot 14, fronting 35 feet by 127½ feet; also an undivided half interest in lot on Marmaduke avenue in city block 4816, 100 feet by 160. Also undivided half interest in a lot on Odell avenue.

Q. Just a moment.

A. City block 4818, 100 feet by 161. All those parcels were acquired, that is, the undivided half interests were acquired under the will of John F. Lee, deceased.

Q. That is, a gift by devise?

A. Yes, the other half going to St. Louis University. Now, a parcel on Forest Park boulevard, city block 3885, having a frontage of 90 feet by 160—is that in this present petition?

Q. Yes.

A. Well, it should not be, because it is not investment property. That is the Medical School dormitory.

Q. I am not making any distinction here on that. You can describe it?

A. All the property I have described heretofore is either unimproved, or it is industrial property or residence property; some of it flats, and some cheap buildings.

The Court (Q.): Revenue is derived from it?

A. Some of it, yes.

[fol. 97] Q. It is intended, for the moment, for the production of revenue when you can get it?

A. Yes, or for sale, if you can realize on it. But, this piece, ever since the building was put up—it was put up for a dormitory for the students at the Medical School—and has always been used for that purpose. That is on

Forest Park boulevard, in city block 3885, 90 feet on Forest Park.

Mr. Burkhardt: Do you know whether this particular item is in the tax bills for 1932 taxes; this Medical School dormitory?

A. Well, I don't know. It was in the tax bill for 1933 taxes, but I don't know about 1932.

Mr. Williams: Yes, that is included.

The Witness: The next is a lot on West Pine boulevard, city block 3920, 130 feet by 223. That was acquired on July 8, 1929, from the Bordeau Real Estate Company, in exchange for the Olivia building on the northwest corner of Grand and Windsor place.

Q. Where did you get the Olivia building?

A. The Olivia building we got from Nathan Frank in exchange for an apartment just east of the Chase Hotel on Lindell boulevard.

Q. Where did you get that apartment?

A. That apartment we got in a settlement with Chase Ullman. Mr. Bixby gave us the entire issue of second mortgage bonds on the Chase Hotel, and the Chase Hotel Company defaulted in the payment of the interest and principal, and we made a settlement with Chase Ullman, by which we got a considerable amount of cash and the Chase apartment from him. Title to the Chase apartment [fol. 98] was in him, and then we afterwards gave that to Nathan Frank for the Olivia building on Grand avenue, swapping one yellow dog for another. The next is on Laclede avenue, city block 3920, 80 feet by 223 feet and 3 inches.

Q. Just a moment, please?

A. Maybe that is not in the 1931 assessment. I don't know.

Q. I don't think it is.

Mr. Burkhardt: Maybe it was acquired after June 1st.

Mr. Williams: It is not in the tax bills.

A. Then we acquired it afterwards. The next is a parcel on McKinley avenue, city block 4782, 50 feet by 155, acquired February 19, 1924, by conveyance from Hattie F. Moser. That was purchased.

Q. What is that property?

A. It has flats on it.

Q. Where is it located with reference to the Medical School?

A. Immediately east of the Medical School.

Q. What was the purpose of the acquisition?

A. We acquired a number of properties or lots in that block, as prospective sites for new University buildings.

Q. For additions to the Medical School?

A. Yes, for additions to the Medical School.

Q. Acquired for that purpose?

A. Yes. The next is also on McKinley avenue, in the same block. The first was lot 5, and this is lots 6, 7 and 8, acquired for the same purpose by purchase from Laura Birdie (?) and others April 12, 1924. That is lot 6. Lots [fol. 99] 7 and 8 were acquired by purchase on June 10, or in June, 1910. There are also flats on that. Lots 9 and 10, in city block 4782, acquired January 3, 1923, from A. B. Ewing, Jr., and others.

Q. What was the purpose of that?

A. The same purpose, sites for Medical buildings, or departments of the School of Medicine. Lots 11 and 12, Block 4782 on McKinley—no, that's on Scott avenue.

Q. That's right; 11 and 12?

A. The ones I gave you before in 4782 are on Scott avenue, not McKinley avenue. They are in the same block, but on the other street.

Q. I think you are mistaken about that, according to my list here. I have a list of the descriptions exactly as you gave them.

Mr. Burkhardt: There is a piece on Scott in the same city block.

Mr. Williams: Yes.

The Witness: There are two parcels on McKinley, and there are—three parcels on McKinley, and we have had two so far, and there are two parcels on Scott avenue here, following each other.

Q. I have six pieces on McKinley on this list.

A. Let's go back a bit. A parcel acquired from Hattie Moser, that was lot 5, block 4782. Then there are lots 6, 7 and 8——

Q. That's right.

A. In the same block.

Q. Yes. And there are 9, 10, 11 and 12.

A. Hold on for a minute, 6, 7 and 8. Lot 6 was acquired in April, 1924, by purchase, from Louisa Burney and others. Lots 7 and 8 were acquired by purchase in June, 1910. [fol. 100] I can't find the name there. Then you come to lot 24, block 4782, which fronts on Scott avenue.

Q. All right; we'll come back to the other.

A. Lots 24 and 26, and the west part of lot 23, on Scott avenue.

Q. Wait a minute. 4782? Lots 24—What's that lot number?

A. Lot 24, 25 and 26.

Q. I have the western part of lot 23.

A. That is split up. Lots 24 and 25, and the western part of 23, and then lots 26, 27 and 28.

Q. That is right.

A. That's right. There are two parcels there on Scott avenue, fronting on Scott avenue, and lot 24 was acquired by purchase from Blasta Klist (?) February 15, 1924. Lot 25 by purchase February 8, 1924, and the western 25 feet of lot 23 by purchase from Helen Jaccard February 14, 1924.

Q. What was the purpose of the acquisition?

A. The same purpose.

Q. You mean the extension of the Medical School?

A. Yes, sir.

Q. Does that apply to 26, 27 and 28 on Scott avenue?

A. Yes. Lot 26, block 4782, was acquired by purchase from Crevella, February 14, 1924; lots 27 and 28 in the same block on Scott avenue, by purchase from Sebastian Grote, by trustee, November 26, 1930.

Q. Where is the Dental School located?

A. It is on the north side of Scott avenue. This is all on the south side. Next comes a parcel on McKinley avenue, block 4783, lots 23, 24 and 25, and the eastern part of lot 26, frontage 165 by 150. That was acquired January 13, 1911, by purchase from Shumware Realty Company.

[fol. 101] Q. What was the purpose of that, do you know?

A. That was acquired also for additional ground for the Medical group. All the vacant property, flats and improved property that we have on McKinley and Scott avenues, both sides, was acquired for that purpose, and there is still some there we would acquire if we could at a reasonable price. Now then, I'll group a number of parcels now.

Q. All right.

A. Parcel on Greer avenue, city block 5238, being lots 10 to 13; also lots 15 to 17 in the same block, and the western part of 18; also lot 22 in the same block 5238——

Q. I didn't get that.

A. Lots 22, 23 and 24 on Greer avenue; also lot 26.

Q. Well, go ahead. When was it acquired?

A. And lot 21. I'll give you those numbers again. Lots 10 to 13, 15 to 17——

Q. Part of 18?

A. Yes, and lot 22, lot 23 and 24, lot 26, lot 31 and the western part of 32.

Q. I haven't got those. I have lots 15 to 21.

A. Well, now then, there are some more. Those are all on Greer avenue.

Q. Yes?

A. A lot on Labadie avenue, city block 5238, lot 68 and the western part of 67, and the eastern part of 69.

Q. I have no Labadie avenue either. We are talking about taxes on property we owned June 1, 1931.

A. Well, I guess, as a matter of fact, those lots, probably, were not assessed. As I recall. I noticed that they were not.

Q. All right.

A. In 1931. We had acquired them before. I'll just complete that, if it is worth while.

[fol. 102] Q. What I want to get at here—you have given me lots 10 to 13. Tell me about those?

A. Well, they were acquired in the same way as this Oklahoma City property, under the will of George Warren Brown, deceased.

Q. You exchanged property you got from George Warren Brown for this property?

A. We got from the George Warren Brown estate, all of the stock of the Avenue Corner Realty Company, and the title to all these lots and the Oklahoma City lots was in the Avenue Corner Realty Company, and when it was dissolved it conveyed the title to the Washington University.

Q. These lots 10 to 13—is that true also of lots 15 to 17 and part of lot 18?

A. It is true of everything on Greer and Labadie avenues. Everything we have there we got in that way. Now then, a lot on Spruce street, city block 434, 187 feet by 210 feet, acquired by purchase May 31, 1907, from the Tiffany Real Estate Company; a lot on 11th street, city block 823,

60 feet by 100 feet, acquired on May 23, 1924, from the Burdeau Realty Company in exchange for property known as 2628-50 Washington avenue, and 1916-36 Olive street.

Q. Where did you get those pieces of property you exchanged with Burdeau, do you know?

A. Well, no, I can't tell you now. I have not been able to run all these down, but I am sure, from the character of the property, that they were gifts, every one of them.

Q. Do you have any property on Third street?

A. We have some property on the west side of Third, north of Olive.

[fol. 103] Q. I have a parcel of property on Third, city block 66?

A. That I have not called off to you?

Q. Yes.

A. Oh, well, I think I know what that is. That is 18 feet, 9 inches.

Q. That's right?

A. City block 66. I have given you that. That was acquired by deed of gift from Joseph B. Given November 17, 1930.

Q. I am still short on my list two parcels on McKinley avenue, in city block 4782, lots 9 and 10 and 11 and 12. Those are additions to the Medical School, are they?

A. Yes.

Mr. Burkhardt: They were acquired by purchase, weren't they?

A. Yes. They were all acquired by purchase.

Q. When you speak of property having been purchased by the University, what do you mean by that? Where do you get your money to purchase it?

A. Well——

Q. Is it investment by way of the endowment fund that you have?

A. It may be, yes. It probably is in many cases. Sometimes it is—of course, we sell one piece of real estate and reinvest it in another piece. That is still by way of endowment, of course.

Q. So, frequently you have taken property that has been given to you and exchanged it for other property?

A. Yes, sir.

Q. And there may be a subsequent exchange then?

A. Yes, there may be half a dozen different exchanges.

Q. What do you do with the income that you derive from the property?

A. From such property? Every cent of the income is [fol. 104] devoted to purely educational purposes; to running the schools.

Mr. Williams: Have we gone into this enough Your Honor, with respect to the descriptions of the property?

The Court:

Q. Yes. There is one question I want to ask. Some of these properties that you have spoken of as having been secured by outright purchases; were those properties secured and purchases made with surplus funds that you had on hand that were not needed for the purposes of the University?

A. Yes, usual endowment funds. Usually, money given us for endowment purposes, or proceeds of securities given us for endowment purposes, when we sell those securities, we would have to find some other investment for the money, and if we find the kind of real estate investment that answers our purposes, we would not hesitate to buy it. But, we have not loaded up with it, by any means. I may say I have here a list of sales made by the University of real estate. We sell what ever we can.

The Court:

Q. I understood you to say a while ago that there never was a surplus or excess of income over expenses or expenditures, of probably more than two or three thousand dollars, and sometimes a deficit of that amount?

A. Yes, that is right.

The Court:

Q. And you had, if I understand you correctly, you had no monies at the end of a year that you could call surplus in the sense that we usually use that term?

[fol. 105] A. In a business sense, no, we never have had, excepting these small amounts, as I say, ranging from $1,000 to $2,000, or $3,000; never in excess of that; and if there was—when there was a surplus of $1,000 or $2,000, or $3,000, instead of it being carried in a surplus account, it is treated as income for the following year.

Q. Part of the budget for the next year?

A. Yes.

The Court: All right.

The Witness: If Your Honor pleases, I can supplement this by a list of real estate that we sold in recent years, in my time. That is not a very long time, either. Washington avenue, the whole of the block bounded on the north by Washington, on the east by 17th, on the south by St. Charles, and west by 18th; another sale, the block bounded by Washington, St. Charles, 18th and 19th streets, except 60 feet on Washington. Those last mentioned parcels were originally the home of Washington University and of the Manual Training School and of Smith Academy; Washington University from 17th to 18th on the south side of Washington, and part of it running—all of it running over to Locust street, and then the Manual Training School on the corner of 18th and Washington, the southwest corner, and in that same block, on the south side of Washington avenue, the Smith Academy.

Mr. Williams:

Q. The Brookings home on Forsythe I believe it was, was that owned by the University, or did Mr. Brookings own it?

A. He built it and has deeded it to the University as a residence for the Chancellor.

[fol. 106] Q. Does the University derive any income whatever from any of that residence property along there?

A. No. The use of the house is part of the Chancellor's salary. He gets the use of the house because he is chancellor. He pays no rent for it.

Q. It is not furnished by the University I do not suppose?

A. The furnishings were a gift by Mr. Brookings to the University for that building, and they are left in the building and are used by the Chancellor.

Q. The Chancellor is often called upon, in a quasipublic capacity, to have meetings and receptions for persons here and for persons from abroad at his home?

A. Yes, very frequently, and the house was built for that purpose. When Mr. Brookings was president, he, of course, looked after that end of it; did the entertaining, largely, that has to be done by the head of the University. Now that largely devolves upon the Chancellor. To continue: A large tract of land on the north side of Enright avenue, bounded on the west by Belt avenue, and on the north by property of the Visitation Academy, on which was later

located the Manual Training School and Smith Academy.

Q. You are now describing property that you sold from time to time?

A. Yes, that was sold. Since then that has been sold. The northwest corner of Broadway and Wash street; property at 410-12 North Broadway. That was purchased by Nugene Dry Goods Company; the northeast corner of Franklin and 18th street; 5227-9 Waterman; 1744 Chouteau; [fol. 107] 3505-9 Franklin; 4452-62 Laclede; 50 feet on the north line of Olive, west of 16th street; 1916 Pine street; 1916-26 Olive street; corner of 13th and Poplar street; 2811 Washington avenue; 3810-12 Washington avenue; lots 29, 30 and 31, city block 4783, on south side of McKinley avenue; 908-16 Clark avenue; 106 feet on the north line of Kingshighway, city block 3889; all of city block 3888, except lots 17, 18, 19 and 20.

Q. Mr. Zumbalen, you spoke a moment ago of the University selling some of this property. Is the University able to sell this property without paying the taxes or assuming them?

A. It cannot sell any of this property that is embraced in this suit now.

Q. Without paying the taxes?

A. Because these taxes are a lien.

Mr. Williams: I think I have covered the matter, unless you have something in mind, may it please the Court.

The Court:

Q. In making an exchange of property, that you say you frequently do, and acquiring other property if there are delinquent taxes on the property which you acquire——

A. —we have to pay them, of course, unless the contract provides that the seller shall pay them.

Q. I understand if taxes are delinquent and due on the property, you pay them?

A. Yes, we do not question that, that taxes assessed before our title attaches, we must clear.

The Court: That is all.

[fol. 108] Re-direct examination.

By Mr. Williams:

Q. I'll ask you whether you owned all these properties we have gone over here, included in the tax bills notice, on the first of June, 1931?

A. Yes.

Q. All right. Have I omitted any questions that you have in mind?

A. Well, I had this in at the hearing before the Tax Commission, and it was thought——

Mr. Burkhardt:

Q. You do not mean a hearing in this particular case?

A. No, that is on later tax bills.

Mr. Williams:

Q. There was no hearing before the Tax Commission on these taxes in controversy here.

A. No, but it was thought important to put it in then, and I don't know if it is more important now, in view of the questions made by the City.

Mr. Williams: That has not been raised as yet.

At this point a recess was taken until 2 o'clock P. M., the same day, at which time the same parties being present, by counsel, further proceedings were had as follows:

Cross-examination.

By Mr. Burkhardt:

Q. This morning, in testifying about these various pieces of property, their manner of acquisition was classified in three ways: gifts, exchanges and purchases?

A. Yes.

Q. According to my figures, there were sixty parcels [fol. 109] altogether, many of which contained more than one lot?

A. Sixty-six, according to my list, 1933 assessment.

Q. There were some purchases after June 1, 1931?

A. Yes, sir.

Q. I believe my check is correct. There were sixty parcels included in the various tax bills, twenty-eight of which represented gifts to the University, six represented exchanges made by the University, and twenty-six parcels represented purchases made by the University. Now, of those sixty, how many were used, on June 1, 1931, for school purposes?

A. What do you mean?

Q. How many were improved with school buildings, or buildings used by the University, if any?

A. I think none of them, as I recollect.

Q. With the possible exception of the Medical School dormitory?

A. That was not on your list here.

Mr. Williams: Yes, it was.

Mr. Burkhardt: Yes, it was.

The Witness: It was on the 1932 assessment.

Mr. Williams:

Q. On the 1931 assessment, too?

A. That is the only one that was being used for school purposes. Others had been built originally for school purposes, but were no longer being used as such.

Q. There were also some parcels of ground purchased for future use?

A. Yes.

Q. For future use to the University?

A. Yes.

Q. Can you tell how many pieces of productive property [fol. 110] the University owned when they received their charter?

A. When they received their charter? None. They did not own any property.

Q. How many pieces of productive property did they acquire shortly thereafter; I mean five or ten years?

A. Well, I cannot give the actual figures on that. I have not checked up on that, but I can say this: I have checked up on this phase of it, as to the productive property covered by the tax bills involved in the suit that went to the United States Supreme Court.

Q. Yes. How many pieces were involved in that particular suit?

A. I can say now, positively, that three pieces were.

Q. Are any of those the same pieces of property involved here?

A. No.

Q. The majority of this property was all acquired after 1900, wasn't it?

A. The great part of it. The great bulk of it.

Q. I believe you did testify that none of it, with the exception of the Medical School dormitory, was on June 1, 1933, used for school purposes?

Mr. Williams: 1931.

Q. 1931.

A. 1931? Yes, that's true.

Q. Now, in this——

A. Pardon me. Used directly for school purposes; no education was being carried on.

Q. I mean all but the one item. That is leased out to the University or rented by the University.

A. Or property from which it was not receiving any income and was just holding, because it had been given to it, and it had not been able to dispose of it.

[fol. 111] Q. Referring to the item of purchases. That does not include property given to the University, but there were twenty-six items under that classification of purchases. I believe that ten of the twenty-six under that classification were purchased recently for additions to the Medical School?

A. Well——

Q. On Scott avenue and in that neighborhood?

A. All on Scott and McKinley avenue were purchased for that purpose.

Q. There have been some purchases since June 1, 1931, for that same purpose, is that correct?

Mr. Williams: I do not think that is material and I object to it as immaterial.

The Court: I'll hear it.

To which ruling of the Court the plaintiff, by counsel, then and there duly excepted and still excepts.

A. I do not recall now any that were purchased for that purpose in this list.

Q. My question was have there been any properties purchased since June 1, 1931, for additions to the Medical School?

A. I think not.

Q. What is the status of the plan for the addition to this Medical School; has construction been started?

A. No.

Q. Have plans been prepared?

A. Oh, there have been from time to time different plans prepared, which have been abandoned because of lack of means to carry them out at the time, and in course of time,

the original plans became obsolete and we would not carry them out today if we had the money.

[fol. 112] Q. There is nothing immediate with this problem of erecting additions to the Medical School?

A. No, I would say not, but largely, mind you, there is nothing immediate because we haven't got the money to put up the buildings.

Q. I see.

A. If we had unlimited means for that purpose, we would.

Q. But, nevertheless, the University did purchase the property?

A. Yes.

Q. All of that in view of the fact that you were confronted with a decreasing enrollment in the last few years?

A. We haven't purchased any in the last year since the decrease took effect at all.

Q. When did that take effect first?

A. It first became manifest, the first drop was in 1932-1933.

Q. I see.

A. The peak was in 1930-1931.

Q. Now, another parcel was the old site of the Fine Arts Building, that the University owned June 1, 1931. That was one site acquired by purchase, I believe?

Mr. Williams: No.

A. The Fine Arts Building?

Q. I mean the old site?

A. The site on Nineteenth and Locust.

Q. Yes, that was a piece of property purchased for that purpose?

A. Yes, sir.

Q. And then there was the old site of the Mary Institute that was purchased by the University, which has now been abandoned?

A. There are two sites of the Mary Institute.

[fol. 113] Q. I mean one of the parcels we have listed as purchased was the old Mary Institute site?

A. Two of them.

Q. Two of them are here?

A. Yes.

Q. Were both of those purchases?

A. No, I'll correct that. Only one is included. The one on Lake and Waterman is not included in this assessment.

Q. Then we have ten parcels——

A. Pardon me. Only the one at Twenty-seventh and Locust.

Q. Then we have ten parcels for the Medical School addition, and one parcel, being the old site for the Fine Arts Building, and one being the old site for the Mary Institute, and the balance of fourteen parcels that were purchased by the University?

A. Yes, sir.

Q. And those fourteen purchases represent investments made by the University, don't they?

A. Yes.

Q. They are not purchases made with any consideration to future occupancy by the University, or anything of that character?

A. No.

Q. They include, in the main, downtown property?

A. Most of those purchases were in what is known as Cupples Station District, and they were made in order to give more property for Cupples Station facilities.

Q. That is on Clark and Spruce; that is in downtown St. Louis?

A. Yes.

Q. You testified this morning that a number of the purchases were made by money received from endowment?

A. Yes.

Q. Also that some of the purchases were made out of general revenue?

[fol. 114] Mr. Williams: No, he did not say that.

A. No, I didn't say that.

Q. That is not true?

A. I say out of free gifts.

Q. And surplus?

A. And endowment money. That's all we can use for that purpose.

Q. You did not testify this morning—I may have misunderstood you—but I thought you said a certain amount of the surplus from each year's budget was sometimes invested in that?

A. No.

Q. With reference to the property classified under "exchanges," you testified you did not know how some of the property that was exchanged had been acquired?

A. That is true; I do not.

Q. You do not know whether some of the property that had been exchanged was purchased outright or received in other exchanges?

A. Or, it may have been gifts.

Q. Or, it may have been gifts. Under that classification, there are six of the parcels, is that correct?

A. Well, you counted them up, I haven't.

Q. One of those was this rather involved real estate transaction of the Olivia Building?

A. Yes, sir.

Q. That, in turn, was obtained by agreement with the owners of the Chase Hotel?

A. The owners of the Chase Hotel and Chase-Ullman.

Q. And the University owned some stock?

A. The University held a second mortgage on the Chase Hotel building proper.

Q. That is how the Olivia Building was acquired?

A. And there was a default in that mortgage, and the [fol. 115] Hotel Company was attempting to reorganize, and Chase Ullman, the originator of the hotel project, joined in that, and in order to get us to surrender and cancel the second mortgage on the Chase Hotel, which was in default, he gave us a first mortgage on the Chase Apartments, and I think about $60,000 in cash; and then we swapped the Chase Apartments for the Olivia Building, which was owned by Nathan Frank.

Q. Then the Olivia Building was traded?

A. Then the Olivia Building was traded for property on West Pine. I say the Olivia Building was traded—there was a large vacant lot in the rear of the building that was not included in the exchange, because we agreed to sell that whole property, which included the vacant property in the rear, to one Matz, a real state agent. He had signed a contract to take it and backed down and we sued him for specific performance, and he finally agreed to take the vacant property in the rear of the Olivia Building, which ran back to the street west of Grand avenue, and pay us a certain amount for that. I have forgotten what it was. That left us with the Olivia Building on hand, and that we exchanged for the building on West Pine.

Q. And the piece of property on West Pine is productive property?

A. Yes.

Q. In this classification of gifts, I notice seven parcels owned in conjunction with St. Louis University; you own an undivided half interest?

A. That is what we got under the will of John F. Lee.

Q. St. Louis University pays taxes on its half of the property?

[fol. 116] Mr. Williams: I object to that as immaterial.

A. I imagine they do. I don't know that is a fact. If they do, they pay because they have no fixed exemption such as Washington University has.

Q. Now, you had a list—read a list this morning—of the sales made during the last few years. Those sales were made during the last twenty-five years, weren't they?

A. The last twenty-five years? Did I say that?

Q. Since your connection with the University?

A. Yes.

Q. Can I see that, sir? These were outright sales. They were not exchanges or trades?

A. Not unless it is noted there.

Q. I did not note any this morning?

A. I don't think there are, but I would not be certain without going over it myself.

Q. How many of the sixty parcels would you say have been acquired in the last twenty-five years?

A. Oh, I don't know.

Q. Well, your best estimate?

A. Well, taking them by number of parcels alone, I should say at least half had been acquired in the twenty-five years, but taking them according to value, I think the number is much less, because I would treat all these parcels in which we have an undivided half interest as one gift.

Q. When you say value, do you mean the assessed value?

A. Actual value of the property, and then, of course, all those parcels acquired from the St. Louis Terminal Cupples Station & Property Company—there were eight or ten par-[fol. 117] cels there—and I treat that as one transaction, all by the same conveyance. That represents a very large amount of money value, whereas an equal number of parcels in which we have an undivided half interest represents a comparatively small amount as to value.

Q. But it does appear from sales that have been made in the last twenty-five years, and purchases also made according to your testimony, that the University has been continually buying and selling various pieces of property within the City of St. Louis?

A. Well, it has bought some and sold some, and there is another sort of transaction that I have not tried to differentiate, and that is that we have had to take in a number of pieces on which we had mortgages.

Q. These real estate transactions are carried on by whom? For the University I mean?

A. Colonel Isaac A. Hedges is the real estate man of the University.

Q. He has his own real estate company, has he?

A. No, he has no real estate company. He is agent for the University.

Q. He is a representative of the University?

A. Yes, sir.

Q. In making all these transactions I have heard about the company?

A. Well, he only recommends them to the Board. He does not make them. The Board authorizes him to make them.

Q. But he is your real estate agent?

A. Oh, yes, he is our real estate agent.

Q. You spoke of mortgages. How many of the sixty parcels have mortgages upon them?

[fol. 118] A. Well, I suppose all of the parcels we acquired—let's see. Probably a dozen parcels, perhaps a few more.

Q. Who holds those mortgages?

A. They were acquired from the St. Louis Terminal Cupples Station & Property Company. There is one mortgage coupling them all.

Q. Twelve parcels are all covered by a blanket mortgage?

A. Yes.

Q. Who holds that mortgage?

A. New York Life Insurance Company.

Q. Of course, they have no connection with Washington University?

A. None whatever, except that connection. They are a creditor of Washington University.

Q. They hold a mortgage on the property included in the tax bills?

A. Yes, sir.

Q. Is there any other parcel that has a mortgage upon it?

A. No.

Q. Have any of those gifts we referred to as having been made to the University—is there any one subject to a life estate in the grantor?

A. I think not. I do not recall any.

Q. You would recall if there were any, would you not?

A. Why, I think so.

Q. Do you recall, since your connection with the University, any gift being made in that manner?

A. No.

Q. The University has possession of all those sixty parcels of property?

A. Yes.

Q. I would like to see the mortgage list if you have that with you. I think you spoke of it this morning.

A. The mortgage list?

[fol. 119] Q. Yes; the list of those twelve pieces.

A. These figures refer to the items as contained in the petition before the Tax Commission.

Q. I understand that. How large a mortgage is that?

A. Well, it is a little over a million dollars now. It is being paid off at the rate of $50,000 per year.

Q. You would consider that a first-class mortgage, wouldn't you, Mr. Zumbalen?

A. I certainly would.

Q. In view of the character of the property and its location, and in view of the fact that it has been tax exempt in the past?

Mr. Williams: I object to that last question as immaterial and argumentative.

The Court: Answer the question.

To which ruling of the Court the defendant, by counsel, then and there excepted and still excepts.

A. Well, I don't know that the tax exemption adds anything to the security of the mortgage.

Q. You do know that is something—that taxes have to be paid, don't you?

A. The income from the property is many times sufficient to pay the amortization on the mortgage and interest on the mortgage, and it has been since we owned the property.

Q. This is a rather unusual piece of property in that respect, is it not?

A. It is.

Q. The property has always brought something above the mortgage and above the operating expenses, has it not?

A. Yes, a very substantial sum above it. A sum above it, [fol. 120] without which the University could never have grown to be what it is.

Q. You had a list this morning of donations made to the University of over $25,000 each?

A. Yes.

Q. I wonder if I could see that. This list that you hand me shows that there have been donations to Washington University for various purposes of $26,254,104, in sums of over $25,000 each?

A. Yes.

Q. Were those donations all in cash?

A. Oh, no.

Q. That represents real estate——

A. That represents all sorts of property, real estate, securities, bonds, stocks, cash.

Q. Of course, there are a number of cash gifts included in that item, aren't there?

A. Yes.

Q. And there are a number of cash gifts that have not been listed because they were less than $25,000?

A. Yes; and I am not sure that all gifts over $25,000 are in it, but this is as complete a list as I was able to make on short notice.

Q. Was there ever an appeal taken by the University to the local Board of Equalization in this matter?

A. I am not aware that there was, but I did not attend to that matter. I did not look after that end of the matter at all.

Mr. Burkhardt: Will you admit there was not, Mr. Williams?

Mr. Williams: I have already stated, Mr. Burkhardt, and I'll state again, that these taxes for the year 1932, it is my understanding that no appeal was taken to the City Board [fol. 121] of Equalization, and it is further my understanding that no appeal was taken to the State Tax Commission on these particular taxes for 1932, involved in this case.

The Court: In other words, the proposition to be submitted to the Court here is based on the assessment made by the Assessor; is that right?

Mr. Williams: This proposition that Mr. Burkhardt wants this in for is one that will have to be argued to your Honor.

The Court: I understand.

Mr. Burkhardt: I just wanted to have a record on it.

Mr. Williams: There is no doubt about it.

The Court: In other words, these taxes were levied and are now being attempted to be collected, based on the assessment made by the Assessor?

Mr. Williams: That is right.

The Witness: I may state, if it will help, if your Honor thinks it is material, that I never had any idea that there was any occasion to appeal from the Assessor to the Board of Equalization, unless we questioned the assessment made, that is, the valuation placed upon the property; or questioned the regularity, under the statute, of the Assessor's proceedings.

Mr. Burkhardt: I object to the voluntary statement and move it be stricken out.

The Court: The Court will hear it for whatever it is worth.

To which ruling of the Court the defendant, by counsel, then and there excepted.

Mr. Burkhardt: That is all.

[fol. 122] The Court:

Q. You spoke a while ago about the University owning the mortgage on the Chase Hotel, is that right?

A. Yes.

Q. What was the amount of that mortgage?

A. The second mortgage was $450,000. That is my recollection.

Q. Did you collect interest on the mortgage?

A. We did for a while, and then default was made in the interest and part of the principal when it matured.

Q. The interest payments made on that mortgage to the University, did that money go into your general University budget?

A. It did.

Q. Or, what was it spent for?

A. It went into the general University budget. The understanding was at that time that the bonds secured by the

mortgage were a gift from W. K. Bixby and that eventually, when the bonds were paid, the University would use a certain amount of the bonds in the erection of a building for the school of fine arts. As I say, the bonds never were paid and eventually Mr. Bixby furnished the money from another source for the erection of the building now occupied by the school of fine arts. Of course, whatever interest was collected on the mortgage went into the account we kept as the Bixby account at that time.

Recross-examination.

By Mr. Burkhardt:

Q. What other classifications of investments has the University made other than real estate?

A. Oh, any securities in general. Stocks, bonds, real estate mortgages.

[fol. 123] Q. How do those other investments compare in volume with the investments of the University in real estate?

A. In the last two years they have not held up nearly so well.

Q. I mean the amount invested, how does it compare with the amount invested in stocks and bonds?

A. I can't tell without referring to my reports which I have here.

Q. Have you an annual report or statement, or anything of that nature, that would give you that information?

A. Yes. For the year ending June 30, 1932, or do you want——

Q. Have you the year before?

A. I have the year—no.

Q. That's all right, then.

A. Yes, I have the year before, too. No, I have not. I have 1930.

Q. Give us 1930, and then 1932, if you will, please, sir?

A. For the year ending June 30, 1930, net revenue from the Cupples Station property was $391,700; from all other real estate owned by the University, $516,949; interest on bonds was $187,355; dividends on stocks, $151,152; interest on real estate mortgage notes, that is, notes secured by real estate mortgages, $54,107. For the year ending June 30, 1932, in rentals received from Cupples Station property, net $386,512; from all other real estate owned by the Uni-

versity, $528,319; interest on bonds, $262,677; dividends on stocks, $117,579; interest on real estate mortgage notes, $69,360. For 1933, ending June 30th, net rentals, Cupples Station, $335,150; all other real estate, $507.644; interest on bonds, $201.600; dividends on stocks, $59,429; interest [fol. 124] on real estate mortgage notes $66,681. So that, in the last year, while the net rentals on property, real estate, was comparatively stationary, the interest on bonds increased quite a bit showing we had not added to the one kind of property, and we had to the other.

Q. How did the dividends on stock compare?

A. I think they were larger in recent years than in prior years. It was $59,600 in the last year, and in 1930—no, the interest on stocks or dividends on stocks showed a decrease. In 1930 that item was $151,000 and last year it was the figure I have given you, $59,000.

Mr. Burkhardt: That is all.

The Witness: But the interest on bonds had increased.

By the Court:

Q. In your examination in chief, you stated that the revenue derived from all sources, whether tuition, productive property and every other source of revenue, went into the general budget for operating expenses, is that correct?

A. Yes, sir.

Q. All of it?

A. Every cent of it.

Q. Now, when would you apply to the credit of the budget fund these revenues and moneys derived from bonds, stocks and real estate?

A. The budget each year—the budget for each academic year which of course, runs from July 1st to the following June 30th, is made up in the spring of the year before. That is, next month we will begin working on the budget [fol. 125] for next year. We work on six months actual experience, that is, the six months receipts shown from July 1, 1933, to January 1, 1934, and then for the succeeding six months, I estimate what the income will be.

Q. You anticipate it?

A. Yes, from the—taking the experience of the prior six months, and in that way we get at what we deem will be approximately the revenue available for the next academic

year. Of course, in doing that, we necessarily have to set aside certain funds out of the income. For instance, with respect to the productive properties, we have to set aside money to keep them up, and make necessary repairs, and in some cases to operate them. That we deduct out of our estimates. That is, our actual estimate of what we anticipate will be the income from the properties over and above the necessary expenses of carrying the property.

Mr. Burkhardt:

Q. What was the biggest surplus the University has ever had in their budget?

A. I don't know that I can answer that exactly, because I have never had occasion to go over the reports prior to the time I became treasurer, which was nine years ago; but during my time as treasurer, the surplus has never exceeded $5,000 or $6,000.

The Court:

Q. And that was carried over into the next year?

A. That is carried over into the operating revenue for the next academic year. It is not set aside for the purpose of building up a surplus.

The Court: That is all.

[fol. 126] Redirect examination.

By Mr. Williams:

Q. The decrease in amount that you got from stocks indicates a stoppage or reduction of dividends?

A. Entirely so.

Mr. Williams: That is all.

Recross-examination.

By Mr. Burkhardt:

Q. That is more than made up, however, by the increase in your bonds that you received?

Mr. Williams: It is not as much as made up.

Mr. Burkhardt: It is offset to a large extent.

The Witness: To a large extent it is, but there is another element that has entered, and that is the drop in students.

A drop of three or four hundred in a student body means a large decrease in the University's income for that year, and you see from 1930-1931 to last year, there was a drop of three or four hundred in the student body.

Q. But it also effects a saving in view of the fact that each student costs the University twice as much as he pays?

A. That does not affect the saving for this reason: Even if we have a drop of two or three hundred students in a year, that does not mean that the cost of carrying the student is saved to the University, because we have to have the same teaching staff. They are employed, not from day to day, but for at least one year, usually longer periods than that.

Q. All of them?

A. The great majority of them are.

The Court:

Q. All on a salary?

A. Yes, all on a salary.

[fol. 127] Q. It is possible to curtail the staff?

A. No, in any school year we cannot cut down the staff because the number of students has decreased, because our contracts with those men are at least for one year, always.

Q. But, if you have a decrease for two or three years in a row, you can make the necessary adjustments?

A. We can to a certain extent. We cannot always, because some men we cannot afford to lop off, because we do not know that we would be able to get as good men to replace them. We expect, for instance, present conditions to change. We hope that they will and expect the change in the next two or three years. It is perfectly apparent to us, if not to the layman, that the man who is a valuable man as head of a department, or as an instructor in a department, cannot be laid off simply because for one or two years the University is going to suffer by paying him his salary; because if we let him out, we do not know who to get to take his place when we have to hire someone to take his place.

The Court: How do the salaries, taken as a whole, at Washington University, compare with salaries of other universities of like standing. I do not care to hear the amounts, but how do they compare; larger or smaller?

A. I can say that our salary list is, I should say, easily from forty to fifty per cent lower than that of the great [redacted]stern universities.

Q. How does it compare with our western universities in surrounding states?

A. It is lower than in some. I think some states im- [fol. 128] mediately east of us pay a salary scale on the whole that is higher than ours.

Recross-examination.

By Mr. Burkhardt:

Q. It is higher than some, too?

A. It is higher than some small universities and colleges, yes.

Q. The University of Missouri, it is higher than the University of Missouri?

A. I should say not. I have not made any comparison myself in the last couple of years, but when I was teaching in the Law School I kept tab on it and I found their salaries up there as a whole, in the Law School, were higher than our salaries.

Mr. Burkhardt: That is all.

Mr. Williams: That is all.

Dr. Malvern B. Cloptor, being first duly sworn, on behalf of the plaintiff testified as follows:

Direct examination.

By Mr. Williams:

Q. State your name.

A. Malvern B. Cloptor.

Q. You live here in St. Louis?

A. Yes, sir.

Q. What is your connection with the Washington University?

A. I am president of the corporation.

Q. How long have you been such, doctor?

A. A little over a year.

Q. Doctor, has the university any surplus of income over and above its needs?

Mr. Burkhardt: I object to that as too general.

[fol. 129] The Court: Mr. Zumbalen testified to the same thing. You may ask the doctor.

To which ruling of the Court the defendant, by counsel, then and there duly excepted.

A. We have practically no surplus. If we finish the year with the books balanced, particularly at this time, we feel very happy.

Q. Doctor, has the university any plans or needs for expansion of any sort that you think it ought to gratify?

A. There are a great many things we would like to expand in. We are constantly seeking aid for developing parts of the university, which we are compelled now to carry on in a way we would like to have improved.

Q. Can you mention some of those?

A. The medical school has many projects that it would like to carry on. We would like to add a psychiatric institution to the medical group. That was one of the main reasons for purchasing property to the east of the medical school, the buildings which are between McKinley and Scott avenue.

Q. Would you state, in your judgment, whether that is a need of the medical school to round it out?

A. It is a need.

Q. Have you the means or funds at hand to do it?

A. We have not, and that is the reason we are not going ahead with it. We are planning it, and when the funds are available we can go ahead.

Q. Have you any other needs in mind for the university that you are unable, at this time, to carry out?

A. I do not think any department of the university is satisfied with the way things are going. Each one has [fol. 130] plans for expansion when funds are available.

Q. How many men have you in your law school, full-time men?

A. I am afraid I can't answer that exactly.

Mr. Zumbalen: Seven.

Q. Seven. Have you any other needs in mind, doctor?

A. I do not feel that there is anything very specific. We have plans that call for developing certain activities. That is all I can say. Specifically, I would not like to

mention them, because they are not as yet formulated in a way so we can say what we are going to do.

Q. Have there been any salary cuts on the part of instructors and professors at the university in the last year or two?

A. Yes; there have been two salary cuts.

Q. Do you mind telling the Court what the percentage of them was?

A. The first cut was 4 per cent cut in the salaries. That was then brought to a 10 per cent cut the next year.

Q. Why was that cut made?

A. Because of insufficient funds.

Q. Did that involve other employes other than the teaching staff?

A. Everybne on the university pay roll except those who were getting below $60. I think that exemption was made.

Mr. Williams: That is all.

Cross-examination.

By Mr. Burkhardt:

Q. These plans for the expansion of the university are almost entirely confined to the medical school?

A. They are not. I said I did not care to mention the [fol. 131] others. I mentioned that because you had requested particular information about the land to the east of the medical school, and that is the reason that land was purchased.

Q. But you have plans for the expansion of other departments?

A. Every department in the university.

Q. Despite the increase or decrease in the enrollment?

A. That does not mean we cannot expand.

Q. As a matter of fact, doctor, haven't you got the newest building in the medical group only partly filled; by that I mean the eye, ear, nose and throat hospital?

A. That happens to be one that is dependent largely on an endowment from one of the funds that we received, which is part of the—the larger part of it is in real estate, which has been under discussion this morning, and the returns from this real estate have made it impossible for us to get funds to carry on certain work in the building.

Q. How much of the building is occupied and in use now?
A. The whole of the south half of the building, and about half of the north half.
Q. All the way up?
A. I say about half of the north half and all of the south half.
Q. Mr. Hedges is not on the staff of the university in any way, is he? He is the real estate expert?
A. That is all he has to do with it.
Q. Does he receive a salary, or is it a commission arrangement?
A. You will have to ask Mr. Zumbalen that. I don't know.

[fol. 132] Mr. Zumbalen: He receives a salary.
Mr. Williams: That is all.

HARRY B. WALLACE, a witness, of lawful age, being first duly sworn, on behalf of plaintiff testified as follows:

Direct examination.

By Mr. Williams:

Q. Where do you reside, Mr. Wallace?
A. In St. Louis.
Q. You are president of the Cupples Company?
A. I am.
Q. What official connection have you with Washington University?
A. Second vice-president of the corporation.
Q. Your name is Harry Brookings Wallace, and you are a nephew of Mr. Robert S. Brookings?
A. That is correct.
Q. Were you intimately associated with Mr. Brookings and Mr. Samuel Cupples?
A. Yes, sir.
Q. Were you familiar with their plans with respect to gifts to Washington University?
A. I certainly heard them discussed, and I think I was quite well informed or acquainted with what their plans were.
Q. I would like to ask you this question: Whether the fact that Washington University had the tax-exemption

feature was any consideration for the making of these gifts by Mr. Brookings and Mr. Cupples?

Mr. Burkhardt: I object to that as hearsay and not binding on the defendant.

The Court: If he knew it from the gentlemen who made the gifts, I think it is competent.

[fol. 133] To which ruling of the Court the defendant, by counsel, then and there duly excepted.

A. Mr. Brookings has told me that when he was asked to become president of the Washington University he had given consideration as to just what field he could accomplish the greatest amount of good, and he decided it was education. He was largely influenced to undertake the development of the Washington University because it had a charter which was, in substance, a contribution on the part of the city and state to the development of that university. He told me that the charter had been through the courts, and had been sustained by the Supreme Court of the United States, and therefore he went into the matter. He and Mr. Cupples together gave that Cupples Station property as an endowment to the university, feeling that would be the backbone of building the university up. He gave additional gifts from year to year in the way of medical school buildings and other buildings. He induced Mr. Bush, Mr. Cupples and Mr. Rebstock, and a number of others, to give gifts to the university; and I am quite sure these gifts, and the whole plan for the development of the university, was predicated to a considerable extent upon the charter which the university enjoyed.

Mr. Williams: That is all.

Cross-examination.

By Mr. Burkhardt:

Q. At the time Mr. Brookings told you these things, did he also tell you that at the time this charter was litigated in the United States Supreme Court, the University only [fol. 134] owned three parcels of property?

A. He did not tell me that, but I have heard it. I heard it today.

Q. You heard today that they own sixty parcels of various sizes?

A. I heard that testimony today.

Mr. Zumbalen: I did not say they owned three, but I said they owned three from which they were deriving revenue. I have since thought of one other.

Q. Well four revenue-producing pieces of property. Is Mr. Hedges listed on the pay-roll under salary, or a commission basis?

A. He is on a salary basis. He looks after, primarily, Cupples Station properties, and all the tenants there, and also advises us in reference to other real estate matters.

Q. He also looks after all the property mentioned in this suit?

A. Oh, no; no. Some of that property. He has not, as I understand it, the duty of looking after all of that property.

Q. It is——

A. Mr. Zumbalen can answer that question better than I can.

Q. It is too much for one man, is it not?

A. Well, I don't know. You might say it is too much. I don't know what you mean by that.

Mr. Burkhardt: I think that is all.

Mr. Williams: I want to offer in evidence a certified copy of the record in the case of Washington University v. Edward S. Raus, Collector of the Revenue of the County of St. Louis, Missouri, in the St. Louis Circuit Court of St. Louis County, October Term, 1867, No. 6389. I had [fol. 135] this transcript of the record made up, and there was omitted by mistake or oversight from the record the language of the preliminary injunction, and I had it certified afterwards. This transcript consists of the petition filed by Washington University asserting its exemption from taxation on the 2nd of August, 1867; (2) copy of the writ issued upon this petition; (3) full, true and complete copy of the demurrer as filed by the defendants to the petition on the 8th of October, 1867. Now, as an added sheet, which was omitted from the original transcript, certified under date of October 7, 1867, the preliminary injunction granted by the Court in this case. (4) Full, true and complete copy of the entry entered in the above cause on the 21st of December, 1867, overruling the demurrer, and entering final judgment in favor of the plaintiff and against the defendant; (5) true and complete photostatic copy of the mandate of the Supreme Court of Mis-

souri, as filed in the above-entitled cause June 7, 1870, as fully as the same remains of record. This original transcript I am going to ask the stenographer to mark "Plaintiff's Exhibit 2," and then this portion of the transcript which is on the separate paper, and contains the preliminary injunction, I'll ask him to mark "Exhibit 2-a," to indicate they belong together. I also want to offer in evidence the particular report in this case in the Supreme Court of the United States, the decision being in the case of Washington University v. Raus, reported in 8 Wallace 439. I haven't that report here, but I take it it may be offered with the same effect as if I had the report here and [fol. 136] read it in evidence. I'll give your Honor a copy of it.

Said exhibits offered in evidence by the plaintiff are in words and figures as follows:

Plaintiff's Exhibit 2

In the St. Louis Circuit Court, St. Louis County, State of Missouri, October Term, 1867. The Washington University, Plaintiff, vs. Edward S. Rowse, Collector of the Revenue of St. Louis County, State of Missouri, Defendant.

PETITION

Plaintiff states that it is a corporation duly organized and existing under the Acts of the General Assembly of the State of Missouri below stated:

That the said General Assembly of the State of Missouri incorporated the "Eliot Seminary" by an Act entitled "An Act to incorporate the Eliot Seminary" approved February 22nd, 1853, which is in the words and figures following:

"Be it enacted by the General Assembly of the State of Missouri as follows:

"Section 1. Christopher Rhodes, Samuel Treat, John M. Krum, John Cavender, George Partridge, Phocion R. McCreery, George Pegram, N. J. Eaton, James Smith, Seth Roulett, Mann Butler, William G. Elliott, Jr., John Row, Hudson E. Bridge, William Glasgow, Jr., Samuel Russell and Wayman Crow and their associates and successors are hereby constituted a body corporate and politic by the

name of 'the Eliot Seminary' and by that name shall have [fol. 137] perpetual succession and be capable of taking and holding by gift, grant, devise or otherwise, and conveying, leasing or otherwise disposing of any estate, real, personal and mixed, annuities, endowments, franchises and other hereditaments which may conduce to the support of said Seminary, or to the promotion of its objects; all property of said corporation shall be exempt from taxation and the sixth, seventh and eighth sections of the first Article of the Act concerning corporations, approved March 19th, 1845, shall not apply to this corporation.

"Section 2. The management of the affairs of this corporation shall be vested in a board of seventeen directors; the persons herein named shall constitute the first board of directors. Vacancies occurring in the board by resignation, death or otherwise, shall be filled by the board.

"Section 3. The board of directors may prescribe the course of instruction in said Seminary and organize the institution under such regulations and provide in such way as they may deem proper for the appointment of its professors, teachers and other officers, and may make such by-laws and rules as they may deem necessary for the management of the institution.

"Section 4. This act shall take effect upon its passage.

"Approved February 22, 1853."

[fol. 138] That under said Act said "Eliot Seminary" without delay organized for the purposes therein stated and was an existing corporation under its said corporate name and by said name acquired and held property as such and in all respects exercised and enjoyed the rights and franchises by said Act conferred until the passage of the Act next hereinafter mentioned.

That afterwards the said Act of the said General Assembly was amended by an amendatory act entitled "An Act to amend an Act entitled 'An Act to incorporate the Eliot Seminary'", approved Feby. 12, 1857, which is in the words and figures following:

"Be it enacted by the General Assembly of the State of Missouri, as follows:

"Section 1. The name of the corporation known as 'The Eliot Seminary' shall henceforth be 'The Washing-

ton University,' by which name the said corporation shall have, hold and enjoy all the property, rights, franchises, endowments, immunities and privileges conferred upon and belonging to the Eliot Seminary.

"Section 2. No instruction either sectarian in religion or party in politics shall be allowed in any department of said University, and no sectarian or party test shall be allowed the elections of professors, teachers, or other officers of said University or in the admission of scholars thereto or for any purpose whatsoever.

[fol. 139] "Section 3. It shall be the duty of the Board of Directors of said University upon being informed of any violation of the second section of this act forthwith to institute an enquiry into the charge or charges that may be preferred in respect thereof by any credible person in writing against any officer of said University; and if it shall appear that any officer of said University has violated the said second section of this act, the Board of Directors shall forthwith remove such person so offending from any office which he may then fill in any department of said University, and such person so removed shall be forever thereafter ineligible to any office in said University.

"Section 4. In case the Board of Directors upon being notified in writing by any credible person of a violation of the second section of this Act, shall refuse or neglect to investigate the charge thereupon preferred against any officer of said University, it shall be competent for the St. Louis Circuit Court, or the St. Louis Court of Common Pleas, to compel the Board of Directors by mandamus, to perform their duty in investigating such charge, and to show their performance of such duty to the satisfaction of the Court having cognizance of the matter, and all proceedings under this section shall be summary, and conducted to a conclusion with as little delay as possible; and the power hereby given to the said courts may be exercised by the judge of either of said tribunals in vacation.

[fol. 140] "Section 5. Whereas the said Eliot Seminary has purchased for the purpose of erecting thereon university buildings, a tract of land within the present corporate limits of the City of St. Louis, containing about three 40/100 acres of land, bounded on the East by an alley, on the West by Beaumont Street, on the South by Locust

Street, and on the North by Washington Avenue. And Whereas said tract of land, before being conveyed to the said corporation was described and designated in a plat filed in the Office of the Recorder of Deeds of St. Louis County as a part of an addition to the City of St. Louis, and certain streets and alleys were marked and shown on said plat as traversing said tract, but were never actually opened and laid out on the ground through said tract; and whereas, it is desirable that the buildings proposed, the said University, should cover a large portion of said tract, and that the whole thereof should be within one enclosure, and secure from uninterruption or disturbance; therefore, it is hereby enacted, that all streets and alleys existing in contemplation of law, through, over or upon the said tract of land, so acquired by said corporation as aforesaid, shall be and the same are hereby vacated and abolished; and it shall not be lawful for the City of St. Louis or the County of St. Louis to open any road, street, alley or avenue through or over said tract or any part thereof so long as it shall remain the property of said corporation without the consent of the Board of Directors [fol. 141] of said University expressed by resolution formally entered upon the minutes of their proceedings.

"This act shall be in force from and after its passage.
"Approved February 12, 1857."

That said last mentioned act was immediately and duly accepted by said Eliot Seminary as an amendment to the charter thereof then previously in force and that said new corporate name of "The Washington University" was immediately adopted and ever since has been and now is used by said corporation, to-wit, the plaintiff.

That said defendant Rowse is the Collector of the Revenue for said St. Louis County, duly appointed and qualified as such according to law, and is now engaged in discharging his duties as such in collecting State, County, Military and School Taxes therein.

That plaintiff has constantly been actively employed in the legitimate prosecution of the specific purpose of its incorporation in said Charter set forth; that it has established in said City of St. Louis and now maintains therein schools of a high order for the education of the young of both sexes at an annual expense of many thousand dollars;

That by gift, grant and devise from sundry persons in aid of the said purposes thereof, and in consideration of the special provisions of said Acts of Incorporation above set forth said corporation has acquired a large amount of [fol. 142] property as well real as personal in the County of St. Louis, Missouri, and now owns the same in fee simple and absolutely; that the defendant as such Collector now holds among other tax bills for State, Military, County and School Taxes in his hands for collection two tax bills against plaintiff for State, County, Military and School Taxes for the year 1866 assessed against sundry parcels of land and improvements thereon situated in said County of St. Louis and of which plaintiff is the real owner and which were in fact the property of plaintiff at and before the time of such assessment.

That said bills for said taxes were made out by the officers of said County authorized by law to assess property in said County for such taxes and were delivered to and are now held by defendant for collection in the manner provided by law.

That the total amount of said two tax bills is Three Thousand Five Hundred and Nineteen 04/100 Dollars ($3519.04) and true copies thereof are herewith filed and made a part of this petition, and are marked Exhibits A and B respectively.

That defendant has demanded payment of said tax bills and payment thereof having been refused by plaintiff defendant is now about to proceed to collect the same by levy and sale of said lands, and has advertised the same as delinquent and liable to be sold for nonpayment of said taxes thereon in the manner provided by law in respect [fol. 143] to delinquent taxes on lands in St. Louis County.

Plaintiff further states that by reason of the provisions of said first mentioned Act of February 22d, 1853, incorporating said Eliot Seminary, and of said Act amendatory thereof, said taxes are illegally assessed and are not nor any part thereof lawfully due from nor payable by plaintiff, all property of plaintiff being by said Acts expressly exempted from taxation at all times;

That if defendant makes a levy and sale of said lands or any part thereof for the collection of said tax bills no adequate remedy will be afforded to plaintiff by an action for damages against said defendant because by such sale and pending such suit a cloud will be cast upon the title of

plaintiff to said real estate, a part of which plaintiff is now endeavoring to sell in order to obtain money for its charitable purposes, and also because the same question would arise each successive year in respect to successive tax bills assessed against plaintiff.

Wherefore the plaintiff prays this Honorable Court for its order enjoining and restraining the defendant as such Collector from collecting by levy and sale as aforesaid the money claimed for taxes in and by said two tax bills or any part thereof, and from offering said lands or any part thereof for sale for any taxes alleged to have been assessed against the same; and also that defendant be adjudged to pay the costs of this proceeding.

[fol. 144] And as in duty bound this plaintiff will ever pray.

(Signed) Henry Hitchcock and George W. Lubke, Attorneys for Plaintiff.

Seth A. Roulett, Treasurer and Agent for plaintiff, having been duly sworn according to law on oath says the foregoing petition and the matters therein stated he believes to be true.

(Signed) S. A. Roulett.

Subscribed and sworn to this Second day of August, A. D. 1867. Witness my hand and the seal of said court.

(Signed) Frank. A. H. Schneider, Clerk of the St. Louis Circuit Court.

SUMMONS

The State of Missouri, to the Sheriff of St. Louis County, Greeting:

We command you to summon Edward S. Rowse, Collector of the Revenue of St. Louis County, State of Missouri, to appear before the Judges of our Circuit Court, on the First day of the next Term thereof to be held in the City of St. Louis, within and for the County of St. Louis, on the First Monday of October next then and there to answer the complaint of The Washington University as set forth in the annexed petition; and have you then and there this writ.

Witness, Frank A. H. Schneider, Clerk of our said Court, with the seal thereof hereto affixed, at office, in the City of

[fol. 145] St. Louis, this Second day of August in the year of our Lord, eighteen hundred and sixty-seven.

(Signed) Frank A. H. Schneider, Clerk. (Seal.)

I acknowledge myself bound for all costs that may accrue in the case of —— against ——.

Witness my hand and seal at St. Louis, this — day of ——, 186—.

——. (Seal.)

St. Louis Circuit Court, October Term, 1867

The Washington University, Plaintiff,

vs.

Edward S. Rowse, Collector of the Revenue of St. Louis Co., Defendant

Demurrer of the Defendant to the Petition of the Plaintiff

The defendant demurs to the petition of the plaintiff and says that the same does not set forth facts sufficient to constitute the — -or a cause of action and for special cause of demurrer shows that the said plaintiff has not by its said complaint made such a case as entitles it to the relief prayed by its said complaint against this defendant wherefore he prays judgment whether he shall be compelled to make any further or other answer to the said complaint and prays to be hence dismissed with his reasonable costs in this behalf sustained.

H. A. Clover, for Deft.

[fol. 146] State of Missouri,
City of St. Louis, ss:

In the Circuit Court, City of St. Louis, December Term, 1867

Saturday, December 21st, 1867.

The Washington University

vs.

Edward S. Rowse, Collector of the Revenue of St. Louis County, State of Missouri

Judgment

The demurrer to the petition being submitted to the Court and the Court being fully advised of and concerning the

premises, doth order that the same be overruled. Whereupon the defendant declining to plead further herein it is ordered by the Court that final judgment be entered herein for the plaintiff on the demurrer. It is therefore considered by the Court that the injunction heretofore granted herein on the 7th day of October, 1867, be and the same is hereby made perpetual and that the plaintiff recover of the defendant his costs and charges in this behalf expended and have execution therefor.

IN THE SUPREME COURT, HELD AT ST. LOUIS, OF THE STATE OF MISSOURI, MARCH TERM, 1870

May 14, 1871.

THE WASHINGTON UNIVERSITY, Defendant in Error,

vs.

EDWARD S. ROWSE, Collector &c, Plaintiff in Error

JUDGMENT

Error to the St. Louis Circuit Court.

Now again comes the defendant in error and moves the Court in compliance with a mandate of the Supreme Court of the United States heretofore filed, to set aside and vacate its former judgment reversing the judgment of the St. Louis Circuit Court herein; and that the judgment of the said St. Louis Circuit Court be affirmed; wherefore the Court [fol. 147] orders that its former judgment herein be vacated and that the judgment of the said St. Louis Circuit Court be in all things affirmed and stand in full force and effect and that the said defendant in error recover of the said plaintiff in error its costs and charges herein expended and have execution therefor.

STATE OF MISSOURI, ss:

I, T. Fishback, Clerk of the Supreme Court, held at St. Louis, of the State of Missouri, certify that the above and foregoing is a full, true and complete copy of the judgment rendered in the above entitled cause, as fully as the same remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of St. Louis, the Fourth day of June, A. D. eighteen hundred and seventy.

(Signed) O. T. Fishback, Clerk. Per J. F. Bain, D. C. (Seal.)

STATE OF MISSOURI,
City of St. Louis, ss:

I, John Schmoll, Clerk of the Circuit Court, City of St. Louis and State of Missouri, do hereby certify the above and foregoing is a full, true and complete photostatic copy, First, of the petition as filed on the 2nd day of August, 1867 in cause numbered 6389 of the causes of this Court, wherein The Washington University is party plaintiff and Edward S. Rowse, Collector of the Revenue of St. Louis County is party defendant; Second, a full, true and com- [fol. 148] plete photostatic copy of the writ as executed by the Clerk of the Circuit Court on the 2nd day of August, 1867; Third, a full, true and complete copy of the demurrer as filed by defendants to the petition on the 8th day of October, 1867; Fourth, a full, true and complete copy of the record entry entered in the above entitled cause on the 21st day of December, 1867, overruling said demurrer and entering final judgment in favor of plaintiff and against defendant, on said demurrer; Fifth, a full, true and complete photostatic copy of the Mandate of the Supreme Court of the State of Missouri as filed in the above entitled cause on the 7th day of June, 1870, as fully as the same remain of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 30th day of December, 1932.

(Signed) John Schmoll, Clerk, Circuit Court. (Seal.)

Plaintiff's Exhibit 2-A

STATE OF MISSOURI,
City of St. Louis, ss:

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, OCTOBER TERM, 1867

Monday, October 7, 1867.

No. 6389

THE WASHINGTON UNIVERSITY,

vs.

EDWARD S. ROWSE

PRELIMINARY INJUNCTION

Now at this day comes the plaintiff by its attorney and presents to the Court its bond for an injunction executed [fol. 149] according to law in the penal sum of Six Thousand dollars with Wayman Crow and Henry S. Reed, as securities, and prays for an order of injunction herein, wherefore it is ordered by the Court that said bond be approved, and it is further ordered that said defendant his agents and servants be enjoined and restrained from collecting the taxes mentioned in the petition, or from enforcing the collection thereof by the sale of the property mentioned in the petition until the further order of this Court.

A true copy from the record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis, this 16th day of February, 1934.

(Signed) John Schmoll, Clerk, Circuit Court. (Seal.)

Mr. Williams: There is just one thing further: I had Mr. Edmond Koeln, who is a very nice gentleman, called, but he cannot be here today, because he had to be in another court. What I expected to ask him was this (I think Mr. Burkhardt, probably, will be in a position to state that this is his position): I allege that he intends to proceed and enforce these taxes, and that he intends to proceed and

sell this property for taxes, unless otherwise ordered or directed by this Court.

Mr. Burkhardt: I'll agree that the Collector intends to take whatever steps are required of him by the law.

Mr. Williams: Including the exercise of the power of sale?

[fol. 150] Mr. Burkhardt: Yes.

Mr. Williams: All right.

The Court: He cannot sell real estate until he gets a judgment, can he?

Mr. Williams: Yes, he can, under this new law. That's the trouble with this case; otherwise, we would not be here. The plaintiff rests.

Mr. Noble (continuing): —with exhibits attached may be treated as the depositions of the witnesses mentioned in this cause.

Plaintiff offers in evidence Laws of Missouri, 1853, page 290, being the Act of the Legislature granting a charter to Eliof Seminary; also Laws of Missouri, 1857, page 610, changing the name of Eliot Seminary to Washington University.

Which said last offers on the part of the plaintiff were thereupon received in evidence, and are in words and figures following, to-wit:

See Plaintiff's Amended Petition, pp. 3 to 7.

Mr. Noble: Plaintiff offers in evidence Book B—3075, page 387 of the records of the Recorder of Deeds of Jackson County, Missouri, at Kansas City.

Do you want to admit that we own these properties described in our petition or do you want me to put them in?

Mr. Cunningham: I think it would be better to put them in because it would show—

Mr. Noble (continuing): —being a General Warranty Deed from Davidson Realty Company to Washington Uni-[fol. 151] versity, a Missouri corporation, dated May 2, 1932, filed for record May 5, 1932, covering all of Lots 313, except part in Main Street, Block 24, McGee's Addition to the City of Kansas, now Kansas City, Missouri.

Mr. Cunningham: May I inquire off the record?

(Discussion off the record.)

Which said last offer on the part of the plaintiff was thereupon received in evidence and is in words and figures following, to-wit:

Mr. Noble: Plaintiff offers in evidence Book B-2989, page 316 of such records, being the warranty deed made from the University Building Company to Washington University, dated January 14, 1931, filed for record January 19, 1931, covering Lots 6 and 7, Block 2, Ashburn's Addition to the City of Kansas, now Kansas City, Missouri.

Which said last offer on the part of the plaintiff, was thereupon received in evidence, and is in words and figures following, to-wit:

Mr. Noble: Plaintiff offers in evidence Book B-502, page 451 of such records, being a warranty deed from Henry J. O'Brien and Agnes O'Brien, his wife, to Arthur Lee, dated May 31, 1892, covering Lot 10, Block 6, McDaniel's Addition, in Kansas City, Missouri; also Book B-791, page 508 of such records, being an authenticated copy of will of Arthur Lee, and order admitting the same to probate by which the property last described was devised to John F. [fol. 152] Lee; also Book B-3042, page 151 of such records, being an authenticated copy of will of John F. Lee and order admitting the same to probate by which the property last described was devised one-half to Washington University and one-half to St. Louis University; also Book B-3300, page 106 of such records, being a deed from St. Louis University to Washington University, dated April 17, 1937 and recorded April 30, 1937, covering all interest of St. Louis University in such property, such deed being a partition between the two universities of the property devised by John F. Lee——

The Court: What did they do, give half to St. Louis University and half to Washington?

Mr. Cunningham: That is one particular point; one-half was taxable under the Constitution and the other half not.

Which said last offers on the part of the plaintiff, were thereupon received in evidence, and are in words and figures following, to-wit:

Book B-3300, pages 106-107:

A-597197.

Quit Claim Deed

This Deed, made and entered into this seventeenth day of April, nineteen hundred and thirty-seven, by and between St. Louis University, a corporation of the City of St. Louis, State of Missouri, party of the first part, and Washington University, a corporation of the County of St. Louis, State of Missouri, party of the second part.

[fol. 153] Witnesseth, that the said party of the first part, for and in consideration of the sum of One Dollar ($1.00) and other valuable considerations paid by said party of the second part, the receipt of which is hereby acknowledged, does by these presents Remise, Release and forever Quit Claim unto the said party of the second part the following described Real Estate, situate in the County of Jackson, and also in the City of St. Louis, and State of Missouri, to-wit:

1. The Western ten (10) feet of Lot Fifty Eight (58), all of Lots Fifty Nine (59) and Sixty (60) and the Eastern Twenty (20) feet of Lot Sixty-One (61) of Jackson's Subdivision and in Block Twenty Two Hundred Thirty-four (2234) of the City of St. Louis, fronting eighty-five (85) feet on the South Line of Papin Street, by a depth Southwardly of one hundred thirty-five (135) feet to an alley; bounded East by Crompton Avenue, together with rights in and to Papin Street an alley, when and if, vacated.

2. A lot in Breezy Heights and in Block 4818 of the City of St. Louis, fronting 100 feet on the South Line of Odell Avenue, by a depth Southwardly of 161 feet 7½ inches, more or less to an aney on which there is a width of 95 feet; bounded East by Ivanhoe Avenue and West by property of Bushell. Together with the improvements thereon known as and numbered 6700-02 Odell Avenue.

[fol. 154] 3. The Southern 35 feet of lot 14 of McCune's Subdivision and in Block 4813 of the City of St. Louis, fronting 35 feet on the west line of Ivanhoe Avenue by a depth Westwardly between parallel lines to right-of-way of St. Louis-San Francisco Railway. Bounded on the North by Cupples property.

4. Lot 10 Block 6 of McDaniel's Addition to Kansas City in Jackson County, Missouri, said lot known as 610 McGee Street, in Kansas City, Missouri.

5. Lot in Block 54 of Eller's Survey of Carondelet and Block 2916 of the City of St. Louis, fronting 25 feet on the east line of Minnesota Avenue by a depth Eastwardly of 137 feet 11 inches to an alley; bounded South by property now or formerly of Ida M. Bauer, and north by property now or formerly of Emil Groberg and wife.

To have and to hold the same, together with all rights and appurtenances to the same belonging, unto the said party of the second part, and to its successors and assigns forever.

So that neither the said party of the First Part, nor its successors, nor any other person or persons for it or in its name or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises, or any part thereof, but they and every one of them shall, by these presents, be excluded and forever barred.

[fol. 155] In Witness Whereof, the said party of the first part has executed these presents the day and year first above written.

Attest:

Internal Revenue $5.50 St. L. W. 4/14/37. (Seal.)
Joseph L. Dairs, S. J. Secretary.

St. Louis University by H. B. Crimmins, S. J. President. (Corporate Seal.)

STATE OF MISSOURI,
City of St. Louis, ss:

On this 20th day of April, 1937, before me appeared H. B. Crimmins, S. J., to me personally known, who being by me duly sworn, did say that he is the President of St. Louis University, a Corporation, of State of Missouri, and that affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and that H. B. Crimmins, S. J. acknowledge said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal in the City and State aforesaid, the day and year first above written.

(L. S.)

Frederick R. Danley, Notary Public. (Seal.)

[fol. 156] My term expires Nov. 2, 1938.

Filed and Recorded Apr. 23, 1937, at 10:03' 30" A. M.
John P. English, Recorder.

STATE OF MISSOURI,
City of St. Louis, ss:

I, the undersigned, Recorder of Deeds for said City and State, do hereby certify that the foregoing instrument of writing was filed for record in my office, on the 23, day of April A. D., 1937, at 10:03' 30 o'clock A. M. and is duly recorded in Book 5650, page 509.

Witness my hand and official seal on the day and year aforesaid.

John P English, Recorder.

Filed for record and duly recorded in my office on this 30th day of April, A. D. 1937 at 1 o'clock 37 minutes P. M. Joseph S. Crisp, Recorder, By William G. Holmes, Deputy.

Mr. Noble: Plaintiff offers in evidence the abstract of the record in the case of Washington University against Rouse, as shown at page 98 and following of the abstract of the record in the suit of Washington University against Koeln.

Which said last offer on the part of the plaintiff was thereupon received in evidence, and is in words and figures, see pp. 136 to 150 of this abstract.

Mr. Noble: Plaintiff offers in evidence the transcript of the record in the suit of Washington University against [fol. 157] Koeln, including the petition, answer and other parts of the record.

Which said last offer on the part of the plaintiff was thereupon received in evidence, and is in words and figures, see p. 67 to p. 150 of this abstract.

Mr. Noble: That is our case.

The plaintiff here rested its case.

OFFERS IN EVIDENCE

Mr. Cunningham: Kansas City offers in evidence Chapter 34, Article 1, Section 7 of the Revised Statutes of Missouri of 1845, as follows:

"A charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension and repeal, in the discretion of the Legislature."

Mr. Noble: Plaintiff objects to the offer just made for the reason that the Act granting this Charter to Washington University specifically states that the Legislative Act just offered in evidence shall not apply to it.

The Court: Objection overruled.

Mr. Cunningham: Kansas City asks that certain tax bills which are now identified as tax bills of Kansas City involved in this case, Tract No. 44,483; Tract No. 44,564; Tract No. 86,757; No. 113,845; No. 44,700; No. 87,809; No. 115,330; No. 44,367; No. 86,545; No. 113,398; No. 45,131; No. 87,568 and No. 115,273 be identified as Kansas City's exhibit of taxes claimed——

(Reporter here identified documents last above referred to collectively as Exhibit No. 2.)

Mr. Cunningham (continuing): And are hereby introduced in evidence.

[fol. 158] Which said last offer on the part of the defendants was thereupon received in evidence, and is in words and figures, see p. 48 for photostatic copies.

Mr. Cunningham: I think that is all.

The defendants here rested their case.

Mr. Noble: May I reopen my case and offer in evidence all tax bills attached to the amended petition of the plaintiff in the case that is which you, yourself, introduced, but I also ought to have it as part of my case.

Which said last offer on the part of the plaintiff was thereupon received in evidence and is in words and figures, see photostats, p. 48.

This was all the testimony introduced in the case.

Mr. Cunningham: Now, is there anything else?
How much time do you want on briefs?

(Discussion off the record.)

Thereupon the case was by the Court taken under advisement.

And afterwards, and on the 24th day of February, 1940, the same being the 41st day of the regular January, 1940, term of said Court, the Court rendered the following Order,

Judgment and Decree in said cause in words and figures following, to-wit:

JUDGMENT

On the 26th day of January, 1940, this cause came on regularly for hearing and the parties appearing by proper representatives and by their respective attorneys, and the [fol. 159] cause was submitted to the Court upon the pleadings and evidence adduced and by the Court taken under advisement. Now on this 24th day of February, 1940, the Court being fully advised in the premises doth find all the issues herein in favor of plaintiff and against defendants.

It is, Therefore, Ordered, Adjudged and Decreed as follows:

That the parcels of property and each of them, described in plaintiff's petition as owned by plaintiff, viz:

All of Lots six (6) and seven (7), Block two (2), Ashburn's Addition to the City of Kansas, now Kansas City, Missouri, according to the recorded plat thereof.

All of Lot three hundred thirteen (313) (except part thereof in Main Street) in Block Twenty-four (24), McGee's Addition to the City of Kansas, now Kansas City, Missouri, according to the recorded plat thereof, being *being* a tract or parcel of land fronting 49 feet 6 inches on the east line of Main Street by a depth eastwardly between parallel lines and along the north line of East Seventeenth Street 113 feet 6 inches to alley.

All Lot Ten (10) in Block six (6), McDaniels' Addition, an addition in Kansas City, Jackson County, Missouri;

were and are under the Acts of the General Assembly of the State of Missouri incorporating plaintiff and constituting its charter, exempt from taxation.

[fol. 160] That by reason of said charter exemptions the assessment and levy of taxes upon the said property and the issuance of tax bills against the same were and are contrary to law and void.

That tax bills made out and issued for tax is against said property and any parcels thereof for 1933 and subsequent years were and are unauthorized by law and void, and that the said tax bills, and each of them and any reissue or renewals thereof ought to be and are hereby ordered cancelled.

That the temporary injunction heretofore issued by this Court on November 20, 1934, be made permanent, and that defendant Frank McCabe as Assessor of Kansas City, Missouri, and his deputies, agents and servants be forever enjoined and restrained from assessing any general city taxes against any of plaintiffs' said property and that the defendant H. J. Gorman as City Treasurer of Kansas City, Missouri, his deputies, agents and servants be and they are hereby forever enjoined and restrained from in any manner collecting or enforcing or attempting to collect or enforce the payment of any of said tax bills or any renewals or reissues thereof and from seizing, offering for sale or selling plaintiff's said property or any part thereof for the enforcing or collection of any of said tax bills or any renewals or reissues thereof.

And that plaintiff have and recover of the defendant its costs herein.

Entry furnished.

[fol. 161] And afterwards, and on the 27th day of February, 1940, the same being the 43rd day of the regular January, 1940, Term of said Court, at the same term, and within four days after the rendition of the judgment herein, the defendants filed herein a Motion for New Trial, in words and figures following, to-wit:

MOTION FOR NEW TRIAL

Come now H. J. Gorman, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, defendants in this cause and move the Court to set aside the finding and judgment in the issuance of the peremptory writ and to grant to defendants a new trial in the above entitled cause, and assign as reasons therefor the following errors each and all of which are material to the issues and to the rights of defendants and which entitle defendants to a new trial and rehearing:

1. Because the findings, judgment and peremptory writ are against the evidence;

2. Because the findings, judgment and peremptory writ are against the weight of the evidence;

3. Because the findings, judgment and peremptory writ are against the law;

4. Because the judgment of the Court is against the law;

5. Because upon the law and the evidence the judgment of the Court should have been for the defendants;

[fol. 162] 6. The Court erred in failing to find and rule that plaintiff had an adequate remedy at law;

7. The Court erred in failing to find and rule that it had no jurisdiction in this matter;

8. The Court erred in failing to find and rule that plaintiff has been guilty of laches and is not entitled to relief in this Court;

9. The Court erred in failing to find that plaintiff has exceeded its corporate powers and has forfeited the immunities claimed herein;

10. The Court erred in finding and decreeing that plaintiff is not liable for taxes upon any property involved herein;

11. The Court erred in failing to find from all the evidence that plaintiff was not and is not entitled to any relief in this Court and in failing to enter its judgment and decree in favor of defendants;

12. The Court erred in not holding that plaintiff's bill fails to allege facts sufficient to constitute a cause of action;

13. The Court erred in holding and deciding for plaintiff and against defendants in that such holding and decision violates the Constitution of the State of Missouri as effective November 30, 1875, and at present, by being contrary to and in violation of Sections 6 and 7 of Article X of said constitution;

14. The Court's finding and decree violated and were contrary to Sections 6 and 7 of Article X of the Constitution of Missouri;

[fol. 163] 15. The Court erred in finding and decreeing that the alleged agreement or exemption was valid and binding and within the intendment and protection of Section 10, Article I of the Constitution of the United States providing against impairment of contracts;

16. The Court erred in holding and decreeing that Sections 9742 and 9743 of the Revised Statutes of Missouri of 1929 do not bar any alleged immunity claimed by plaintiff

and in finding and deciding that said sections are null and void as being contrary to and in violation of Section 10, Article I of the Constitution of the United States in that the same impairs the obligation of contracts;

17. The Court erred in deciding and decreeing that the legislature of the State of Missouri acted so as to contract or bargain away forever the taxing power with regard to the plaintiff, and in holding that to decide otherwise would violate Section 10, Article I of the Constitution of the United States which provides among other things that no state shall pass any law impairing in any way the obligations of contracts;

18. The Court erred in holding and deciding that the transaction here involved was within the intended protection and scope of Section 10, Article I of the Constitution of the United States;

19. The Court erred in finding and decreeing that this transaction was in the nature of a contract and in holding the same to be binding upon defendants in that such finding and decreeing is contrary to the equal protection clause of [fol. 164] the Constitution of the United States and contrary to the Fourteenth Amendment of the Constitution of the United States;

20. The Court erred in deciding and decreeing that this transaction was not contrary to Article IV, Section 25 of the Constitution of the State of Missouri which provides that the legislature shall not pass special laws exempting persons or property from taxation;

21. The Court erred in deciding and decreeing that this transaction between plaintiff and the legislative representatives of the state was binding so as to prevent Kansas City from levying municipal taxes upon property owned by the plaintiff within the limits of Kansas City in that the same is a violation of the Fourteenth Amendment of the Constitution of the United States in that it validates a transaction which would abridge the privileges and immunities of the citizens of the United States and would cause property of the inhabitants of the State of Missouri to be taken without due process of law and deny the equal protection of the laws to all persons, all of which rights are guaranteed by

the Constitution of the United States and the Constitution of the State of Missouri;

22. The Court erred in finding and decreeing for plaintiff in that the same is a finding and holding to the effect that Sections 2 and 19 of Article XIII of the Missouri Constitution of 1820 and Section 25 of Article IV of the Constitution of Missouri of 1865 and Sections 6 and 7 of Article X of the Constitution of Missouri of 1875 and Section 16 of [fol. 165] Article IX of the Constitutional Amendment of Missouri of 1920 were invalid and contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States and for the reason that said constitutional provisions and statutes were contrary to Section 10, Article I of the Constitution of the United States concerning the impairment of contractual rights;

23. The Court erred in holding and decreeing for plaintiff and against defendants in that the same violates Section 25 of Article IV of the Constitution of Missouri providing that all property subject to taxation in this state shall be taxed in proportion to its value.

Wm. Paul Pinkerton, City Counselor; Wm. Paul Pinkerton, Elmo Hunter, Assistant City Counselor, Attorneys for Defendants.

Service of motion for new trial is hereby acknowledged this 27 day of February, 1940.

R. B. Caldwell, Attorney for Plaintiff.

Endorsed on the back thereof is the number and style of the cause, the character of the document, and the following: No. 436,537 1-26-40 Div. 8 The Washington University, a Corporation, Plaintiff, vs. H. J. Gorman, City Treasurer of Kansas City, Missouri, et al., Defendants.

[fol. 166] Motion for New Trial

Wm. Paul Pinkerton, City Counselor, Elmo Hunter, Assistant City Counselor, Attorneys for Defendant.

Filed Feb. 27, 1940, Bernard T. Flannery, Clerk, by L. B. Frame.

Order Overruling Motion for New Trial

And afterwards, and on the 27th day of April, 1940, the same being the 41st day of the regular March, 1940, Term

of said Court, the said defendants' Motion for a New Trial was taken up and submitted to the Court, and having been by the Court seen and heard, and duly considered, was by the Court overruled; and to which action and ruling of the Court in overruling said motion, and in refusing to grant the defendants a new trial herein, the defendants then and there duly excepted and still except.

And afterwards, and on the 4th day of May, 1940, the same being the 47th day of the regular March, 1940, Term of said Court, the defendants filed herein their Application and Affidavit for Appeal, in words and figures following, to-wit:

APPLICATION AND AFFIDAVIT FOR APPEAL

Come now H. J. Gorman, City Treasurer of Kansas City, Missouri and Frank McCabe, City Assessor of Kansas City, [fol. 167] Missouri, and pray the Court for an appeal of the above entitled cause to the Supreme Court of Missouri.

Wm. Paul Pinkerton, City Counselor, Elmo Hunter, Assistant City Counselor, Attorneys for Defendants, H. J. Gorman and Frank McCabe.

STATE OF MISSOURI,
County of Jackson, ss:

Elmo Hunter, being duly sworn on oath, says that he is attorney and agent for the above named defendants and appellants in the above entitled case in which said cause said defendants, H. J. Gorman, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, now pray for an appeal in the above entitled cause to the Supreme Court of Missouri, and as such attorney and agent, has authority to and makes this affidavit for and on behalf of said defendants and appellants; and affiant further states that such appeal is not made for vexation or delay, but because affiant believes said appellants are aggrieved by the judgment and decision of this Court in the above entitled cause.

Elmo Hunter.

Subscribed and sworn to before me this 3rd day of May, 1940. Mary Phillips, Notary Public, Jack-
[fol. 168] son County, Mo. (L. S.) My Commission Expires February 28, 1943.

Endorsed on the back thereof is the following:

No. 436,537, The Washington University, a corporation, Plaintiff, vs. H. J. Gorman, et al., Defendants. Application and Affidavit for Appeal—Filed May 4, 1940, Bernard T. Flannery, Clerk, by ——, Deputy. Wm. Paul Pinkerton, City Counselor, Elmo Hunter, Assistant City Counselor, Attorneys for Defendants, H. J. Gorman and Frank McCabe.

ORDER ALLOWING APPEAL

And afterwards, and on the 4th day of May, 1940, the same being the 47th day of the regular March, 1940 term of said Court, the defendants' Application and Affidavit for Appeal was by the Court sustained, and appeal granted and allowed, as prayed, to the Supreme Court of the State of Missouri and the defendants thereupon granted leave to file their bill of exceptions in this cause within the time prescribed by law therefor.

Wherefore, defendants pray the Court to settle and allow this, their bill of exceptions to all and singular the acts, rulings and orders of the Court in the premises, and that the same may be signed, filed and made a part of the record herein.

ORDER SETTLING BILL OF EXCEPTIONS

Now, Therefore, the Court, being fully advised in the premises, doth find the foregoing to be a correct bill of exceptions taken and saved on behalf of the defendants herein, and doth now sign the same, and doth order that the same may be filed and made a part of the record in this cause, which is accordingly done.

[fols. 169-171] Given under the hand of the Judge of said Court before whom said proceedings were had on this 16 day of Sept., 1940.

Paul A. Buzard, Judge of the Circuit Court of Jackson County, Missouri, at Kansas City, Division No. 8.

AGREEMENT TO BILL OF EXCEPTIONS

We hereby consent that the foregoing is a full, true and correct bill of exceptions on behalf of the defendants herein, and agree that the same may be signed, filed and made a part of the record in this cause.

McCune, Caldwell & Downing, Attorneys for Plaintiff. Elmo Hunter, Roy B. Cunningham, Attorneys for Defendants.

[fol. 172] And thereafter, and on the 23rd day of January 1941, the following proceedings were had and entered of record in said cause, to-wit:

No. 37435

WASHINGTON UNIVERSITY, a Corp., Resp.,
vs.
H. F. GORMAN, etc., et al., Apps.

Come now the parties, by their respective attorneys, and after arguments herein submit this cause to the court.

And thereafter, and on the 12th day of June 1941, the following further proceedings were had and entered of record in said cause, to-wit:

THE WASHINGTON UNIVERSITY, a Corporation, Respondent,
vs.
H. F. GORMAN, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, Appellants

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

Now at this day come again the parties, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed and stand in full force and effect; and that the said respondent recover against the said appellants its costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures following, to-wit:

[fol. 173] IN THE SUPREME COURT OF MISSOURI, DIVISION NUMBER ONE, SEPTEMBER TERM, 1940, JANUARY CALL, 1941

No. 37,435

THE WASHINGTON UNIVERSITY, Reespondent,
v.
H. J. GORMAN, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, Appellants

This suit was brought to enjoin the treasurer and the assessor of Kansas City from levying and collecting cer-

tain real estate taxes on property in that city owned by Washington University of St. Louis under a charter exempting all its property from taxes.

The University's petition alleges that it was incorporated by an Act of the General Assembly on February 22, 1853 as the Eliot Seminary. That Act provided that the incorporators "are hereby constituted a body corporate and politic by the name of 'The Eliot Seminary' and by that name shall have perpetual succession and be capable of taking and holding by gift, grant, devise or otherwise, and conveying, leasing or otherwise disposing of any real estate real, personal or mixed, annuities, endowments, franchises and other hereditaments which may conduce to the support of said Seminary, or to the promotion of its objects; all property of said corporation shall be exempt from taxation and the sixth, seventh and eighth sections of the first Article of the Act concerning corporations, approved March 19, 1845, shall not apply to this corporation." The seventh section of the Act concerning corporations referred to in the above provision of the charter, and declared not applicable, was as follows: "The charter of every corporation that shall hereafter be granted by the legislature shall be [fol. 174] subject to alteration, suspension and repeal in the discretion of the legislature." Chapter 34, Article I, Section 7 R. S. 1845. The incorporators named in the act accepted the charter and proceeded to organize Eliot Seminary as a seminary and institution of learning, and the corporation acquired and held property as such and proceeded to carry out the purposes of the charter. On February 12, 1857 the charter was amended by the General Assembly and the name Eliot Seminary was changed to Washington University, by which name the University has since been known. After its founding, the University acquired money and property given to it by various persons in aid of its purposes and has devoted the profit, income and revenue from such property for the carrying on of its educational purposes.

On July 4, 1865 the people of Missouri adopted a new Constitution which provided in Article IV, Section 27 that the General Assembly should not pass special laws exempting any property of any named person or corporation from taxation. Pursuant to this provision the legislature provided for the taxation of all property belonging to elee-

mosynary corporations except that expressly exempt from taxation by the constitutional provisions.

In 1866 Rowse, the collector of revenue of St. Louis County, assessed taxes against the property of the University in St. Louis County. The University enjoined the collection of these taxes, but its action was dismissed by this court (Washington University v. Rowse, 42 Mo. 308). The University appealed from this decision to the United States Supreme Court on the ground that its charter constituted a contract with the State and was protected under Article 1, Section 10 of the Constitution of the United States against any impairment by the State. That court upheld this contention in the Washington University v. Rouse, 75 U. S. 439. This court, in compliance with the mandate from above, set aside its dismissal of the University petition and affirmed the judgment of the trial court granting an injunction in favor of the University.

On October 30, 1875 the people of Missouri adopted a new [fol. 175] Constitution which provided, among other things, that "all laws exempting property from taxation, other than the property above enumerated, shall be void." (Art. X, Sec. 7.) In pursuance to the Constitution the General Assembly adopted statutes providing that all property shall be subject to taxation except such as it has exempted. (Secs. 10936-8, R. S. 1939.) The University contends that the constitutional and statutory provisions as applied to it are null and void, as being contrary to and in violation of Section 10, Article I of the Constitution of the United States and that all its property is exempt from tax.

The University further alleges that in 1931 the assessor of the City of St. Louis levied taxes against its property and was attempting to enforce the collection of the same when it brought suit to enjoin the collector from doing so. It obtained a permanent injunction and the collector appealed to this court. We held that all property of the University, whether or not occupied and directly used for educational purposes, was exempt from taxation and that the University's charter was a valid contract with the State of Missouri that could not be impaired by subsequent legislation. Washington University v. Baumann, 341 Mo. 708, 108 S. W. (2d) 403.

The University charges that notwithstanding the exemption from taxation of its property the defendants have as-

sessed and are attempting to collect taxes on such property and are about to sell the same for non-payment of taxes.

Its prayer asks that the property be declared exempt from taxation and the tax bills be held void and that the defendants be restrained from assessing taxes or attempting to collect or enforce the payment of taxes.

The answer challenges the power of the assembly to grant the original charter and the power to exempt, perpetually, the University's property from taxation. After trial, the court below entered a decree holding that the University's property was not subject to taxation because of the charter exemption and made permanent the temporary injunction previously issued. From this judgment the defendants have appealed.

[fol. 176] Appellants' principal contention is that the question whether the University's charter constitutes a contract with the state is again open for determination because of the ruling of Erie Railroad Company v. Tompkins, 304 U. S. 64. They argue that the decision of the United States Supreme Court in the Rowse case, which held that such charter did constitute a contract, and for that reason was entitled to the protection of the Federal Constitution, was founded upon the doctrine announced in Swift v. Tyson, 16 Peters 1, which permitted Federal Courts to exercise their independent judgment as to what the common law of the State should be, which doctrine is now repudiated by the Erie case. The effect of their argument is that the United States Supreme Court in the Rowse case was bound to follow the decision of this court. This argument is irrelevant.

In the first place the doctrine erroneously announced in Swift v. Tyson was completely extraneous to cases arising under the circumstances of the Rowse case. That doctrine had to do with the application of Section 34 of the Federal Judiciary Act of 1789, 28 U. S. C., Section 725 which provides: "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply." Swift v. Tyson held that Federal Courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court but that they were free to exercise an independent judgment as to the common law of the

State. It is evident that this decision in no way applied to cases to be determined according to the Constitution of the United States. In such cases the act was not applicable. The decision in the Erie case conforms to the act for it states: "*Except in matters governed by the Federal Constitution or by Acts of Congress,* the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute [fol. 177] or by its highest court in a decision is not a matter of federal concern. There is no federal, general common law." (Our italics.)

A review of the two decisions in the University's case against Rowse also dispels this contention. Our opinion in that case recognized that the question to be decided was whether the charter granted by the assembly to the University amounted to a contract because we said: "if it be a contract, it must stand, and the State is bound by it, however inexpedient or injudicious it may have been when made. By the Federal Constitution no State can pass any law impairing the obligation of the contracts." The opinion then proceeds on the theory that there was no contract because there was no consideration for one. There being no contract we held the assembly had no power to grant the University an irrevocable or irrepealable exemption from taxation. On appeal to the United States Supreme Court that court found that there was a consideration for the granting of the charter and therefore there was a valid contract which could not be impaired under the Federal Constitution by any species of state legislation.

We should observe there was a companion case similar in all respects and considered at the same time brought by The Home of the Friendless against Rowse for the same relief. See 42 Mo. 361. In this court the opinion ruling both cases was written in the University case while in the United States Supreme Court the principal opinion was handed down in The Home of the Friendless case.

We certified both cases to the United States Supreme Court on the ground, as stated by that court (75 U. S. l.c. 432, "there was necessarily drawn in question the construction of that clause of the Constitution of the United States, which prohibits a state from passing a law impairing the obligation of a contract, and that the decision was against the right claimed by the complainant, and was necessary to the adjudication of the cause; thus bringing

[fol. 178] the case clearly within the Twenty-fifth Section of the Judicial Act, which gives to this court in such cases a power to examine and affirm or reverse the decision of the State Court."

Under Article III of the Federal Constitution jurisdiction of cases arising under the constitution is vested in the supreme court on appeal under such regulations as Congress shall make. The appeal in these two cases, as pointed out, came under the provisions of Section 25 of the Judiciary Act (1789), 28 U. S. C., Sec. 344.

In this situation it would be absurd to say that the United States Supreme Court is bound by the decision of this court when that very decision is under review on appeal. While it is true the United States Supreme Court in such cases will generally defer in cases of doubt to the decision of a state court in the latter's interpretation of the statutes of its own state, nevertheless its unbroken line of decision establishes the rule that it will form its own judgment as to the existence and construction of the alleged contract. "Of what use would the appellate power of this court be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide independently of all adjudication by the Supreme Court of the State whether or not the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of the State. It never was intended and cannot be sustained by any course of reasoning that this court should or could with fidelity to the Constitution of the United States follow the Supreme Court of a state in such matters when it entertains a different opinion." Jefferson Branch Bank v. Skelly, 66 U. S. 436 at 443.

This rule has been reaffirmed in two decisions handed down since the Erie case, viz. Higginbotham v. Baton [fol. 179] Rouge, 306 U. S. 535 and American Toll Bridge Co. v. Railroad Comm. of California, 307 U. S. 486. For other applications of the rule see the cases cited in these two decisions.

There can be no question but that the decision of the United States Supreme Court in the University's case against Rowse is today the law and is commandingly decisive of this case. We must abide by it now as we did in Washington v. Baumann. We reaffirm our decision in that

case where we said: "* * * the University has a contractual charter with the State and that contract under the decision of the United States Supreme Court in the Washington University Case cannot be impaired by subsequent legislation. It stands superior not only to our present taxing law, but even to our Constitution insofar as they purport to destroy the University privileges and immunities thereunder, relied on for years by it and at least some of its benefactors, as the evidence shows. To do so would be to commit a fraud."

Being of this mind it is not necessary to discuss other points raised by appellants about the wisdom of granting such a charter. In many instances the power to do so was abused so that it has since been abolished or cautiously guarded. But under the protection of the Federal Constitution even grants which turned out to be improvident are beyond the reach of the State. In this instance however it cannot be said that the grant was improvident. When it was made the constitution provided that "schools and means of education shall forever be encouraged." Const. 1820, Art. VI, Sec. 1. The Legislature properly deemed the purposes for which the University was organized to be beneficial to the people. Here were a group of public-spirited and unselfish men generously seeking to establish an educational institution at private expense which to some extent would relieve the State in that field. Laws for the creation of a university supported by the State had been adopted only fourteen years before. It was the burdensome obligations on the State arising "from a false and ruinous [fol. 180] system of loaning its credit to corporations by which it incurred an immense debt" and from the conditions following the civil war all calling for exceedingly onerous taxation which brought about the all-inclusive change of policy through the restrictions in the 1865 Constitution. 42 Mo. l. c. 326. At the same time the principle that education was essential to the preservation of our rights and liberties was reasserted (Const. 1865, Art. IX) and it was again later in the Constitution of 1875 (Art. XI). Verily the same is true today.

The University pleaded and proved two grounds for relief. First, its charter exemption and second, the doctrine of res judicata. The decree of the trial court in favor of the University was based exclusively on the ground that the charter of the University exempted it from taxation.

There is no mention, naturally, of res judicata in appellants' motion for new trial nor did the University appeal from the decree because of the court's failure to rule on this contention. While we find the University's plea of res judicata is upheld by the decisions in Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425, 74 S. W. 979 and North St. Louis Gymnastic Society v. James Hagerman, Jr., 232 Mo. 693, 135 S. W. 42, we can not pass upon it because it is not before us.

The judgment is affirmed.

James M. Douglas, Judge.

All concur.

And thereafter, and on the 21st day of June 1941, the following further proceedings were had and entered of record in said cause, to-wit: No. 37435, The Washington University, resp., vs. H. J. Gorman, etc. et al., apps.

Come now the appellants, by attorney, and file herein a motion for a rehearing.

Which said motion is in words and figures following:

[fol. 181] In the Supreme Court of Missouri, September Term, 1940, Division No. 1

No. 37,435

The Washington University, Respondent,

vs.

H. J. Gorman, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, Appellants

Appellants' Notice of Filing of Motion for Rehearing

Kansas City, Missouri, actual appellant in the above designated case, hereby notifies The Washington University, respondent herein, that on June 21, 1941 it will file with Division Number One of the Supreme Court of Missouri a Motion for Rehearing in the above designated case, a copy of said motion being included with this notice.

W. E. Kemp, City Counselor; Roy B. Cunningham, Elmo B. Hunter, Jerry T. Duggan, Assistant City Counselors, Attorneys for Appellants.

Service of said copy of motion and rehearing and of this notice is hereby acknowledged this 19th day of June, 1941.
McCune, Caldwell, Downing & Noble, Attorneys for Respondent.

[fol. 182] IN THE SUPREME COURT OF MISSOURI, SEPTEMBER TERM, 1940, DIVISION NO. 1

No. 37,435

THE WASHINGTON UNIVERSITY, Respondent,

vs.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, Appellants

APPELLANTS' MOTION FOR REHEARING

Now at this date come the appellants, and respectfully move the Court to set aside its opinion heretofore rendered in this cause and to grant appellants a rehearing thereof for the following reasons, to-wit:

1. This Court has erroneously ruled that the decision of the United States Supreme Court, in the case of Washington University v. Rouse, 75 U. S. 439, is absolutely binding upon this Court so that this Court may not exercise any judgment of its own in this matter. This erroneous ruling must have occurred by virtue of this Court having overlooked appellants' contention that by reasoning analogous to that applied in the case of Phillips Exeter Academy v. Exeter, 11 Atl. (2d) 569 (S. Ct. of New Hampshire), the doctrine established by the case of Swift v. Tyson, 16 Pet. 1, being specifically overruled by the United States Supreme Court in the case of Erie Railroad Co. v. Tompkins, 304 U. S. 64, leaves this Court free to determine the question of whether or not the alleged exemption from taxation of Washington University did in fact amount to an irrevocable contract. This Court has neither cited, discussed nor referred to the case of Phillips Exeter Academy v. Exeter, supra, which case appellants have relied upon as establishing the effect of the decision of Erie Railroad Co. v. Tomp-

kins, supra, to this kind of situation in the absence of any decision of the United States Supreme Court thereon.

[fol. 183] 2. This Court has erroneously ruled that the contention of appellants was that "the United States Supreme Court is bound by the decision of this Court" in the matter under review, when in fact the real question presented by appellants and the position appellants took is that while the United States Supreme Court "does have the power of independent determination as to the existence of a contract, it is nevertheless our contention that since the Erie decision that determination must be made in the light of the law of the state involved. * * *"

3. The Court overlooked the contention of the appellants not only that none of respondent's property was exempt from taxation by virtue of the charter involved, but also that all property acquired subsequent to the enactment of the Constitution of the State of Missouri of 1865 and specifically Article X thereof, which provides that all other than certain named exemptions from taxation shall be void, was not exempt from taxation, it appearing that all property involved in this suit was acquired subsequent to the enactment of the Constitution of Missouri of 1865.

4. The Court erred in stating in its opinion that the respondent Washington University had "pleaded and proved two grounds for relief. First, its charter exemption and second, the doctrine of res judicata." This Court evidently overlooked the acknowledged fact that neither Kansas City, Missouri, nor any of its privies has ever been before any other Court whatsoever to litigate the question presented in this case. In all of the cases mentioned by this Court as having specifically concerned this question, the City of St. Louis was the other party to the suit and different property was being taxed. The rule is clear in this state and elsewhere, that the doctrine of res judicata does not apply unless there has been previous litigation on the same cause and between the same parties or their privies. Baumhoff v. St. Louis & K. R. Co., 205 Mo. 248, 104 S. W. 5, l. c. 10; Mo. Kans. & Texas Railway v. American Surety Co., 291 Mo. 92, 267 S. W. 657, 662; Kirk v. Metropolitan Life [fol. 184] Insurance Co., 225 Mo. App. 756, 38 S. W. (2d) 519, l. c. 521 and cases cited therein. This Court has, through error, confused the doctrine of stare decisis, which

doctrine is that by virtue of previous decisions certain legal principles are established and it is not necessary thereunder that the same parties be before the Court, with the doctrine of res judicata, which doctrine requires that the same parties or their privies be before the Court. By erroneously applying the doctrine of res judicata to appellants who have never, by privy or otherwise, been a party to any previous suit concerning this question, this Court has failed to give full consideration to the principles of law presented by appellants.

5. This Court by erroneously ruling that it had no right to inquire further into the matter because of the effect upon it of the decision of Washington University v. Rouse, 75 U. S. 439, has either overlooked or failed to pass upon points II, III, IV, V and VI of appellants' statement and brief submitted herein.

W. E. Kemp, City Counselor; Roy B. Cunningham, Elmo B. Hunter, Jerry T. Duggan, Assistant City Counselors, Attorneys for Appellants.

Received copy of the foregoing motion and notice that on June 21, 1941 same will be filed with the Clerk of the Supreme Court.

(Signed) McCune, Caldwell, Downing & Noble, Attorneys for Respondent.

June 19, 1941.

[Endorsed:] No. 37,435. In the Supreme Court of Missouri, September Term, 1940, Division No. 1. The Washington University, Respondent, vs. H. J. Gorman, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, Appellants. Appellants' Motion for Rehearing. W. E. Kemp, City Counselor, Roy B. Cunningham, Elmo B. Hunter, Jerry T. Duggan, Assistant City Counselors, Attorneys for Appellants.

[fol. 185] And thereafter, and on the 25th day of July, 1941, the following further proceedings were had and entered of record in said cause, to-wit:

No. 37435

THE WASHINGTON UNIVERSITY, Resp.,

vs.

H. J. GORMAN, etc., et al., Apps.

Now at this day, the court having seen and fully considered appellants' motion for a rehearing, doth order that said motion be, and the same is hereby overruled.

STATE OF MISSOURI, sct:

I, E. F. Elliott, Clerk of the Supreme Court of the State of Missouri, do hereby certify that the foregoing pages contain a full, true and complete transcript of the record and proceedings in a cause entitled The Washington University, respondent, against H. J. Gorman, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, appellants, No. 37,435, as the same are on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Missouri, at my office in the City of Jefferson City this 22nd day of August 1941.

E. F. Elliott, Clerk, Supreme Court. (Seal of the Supreme Court of Missouri.)

[fol. 186] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 24, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 46,039, Missouri, Supreme Court, Term No. 711. H. J. Gorman, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, Petitioners, vs. The Washington University. Petition for a writ of certiorari and exhibit thereto. Filed October 22, 1941. Term No. 711 O. T. 1941.

Office - Supreme Court, U. S.
FILED
OCT 22 1941
CHARLES ELMORE CROPLEY
CLERK

No. 711.

In the

Supreme Court of the United States

October Term, 1941.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri, *Petitioners*,

vs.

THE WASHINGTON UNIVERSITY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

WILLIAM E. KEMP,
City Counselor,
JERRY T. DUGGAN,
ELMO B. HUNTER,
Asst. City Counselors, all of
Kansas City, Mo.,
Attorneys for Petitioners.

SMITH-GRIEVES LAW PRINTERS, KANSAS CITY, MO

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In the

Supreme Court of the United States

October Term, 1941.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri, *Petitioners,*

vs.

THE WASHINGTON UNIVERSITY, *Respondent.*

No. ———.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

Your petitioners, H. J. Gorman, city treasurer of Kansas City, Missouri, and Frank McCabe, city assessor of Kansas City, Missouri, respectfully petition this Court to grant a writ of certiorari to the Supreme Court of the State of Missouri, and to remove therefrom to this Court, for review, the record of the case therein lately pending of The Washington University, Respondent, v. H. J. Gorman, City Treasurer of Kansas City, Missouri,

and Frank McCabe, City Assessor of Kansas City, Missouri, Appellants, being case No. 37,435, on the docket of that court.

Summary and Short Statement of the Matters Involved.

This was a suit brought by respondent, Washington University of St. Louis, Missouri, to enjoin petitioners, the Treasurer and the Assessor of Kansas City, Missouri, from levying and collecting certain real estate taxes on property located in Kansas City, Missouri. Respondent University relied upon a charter granted to it by the legislature of the State of Missouri in 1853, and particularly upon that portion of the charter which provides: "all property of said corporation shall be exempt from taxation and the sixth, seventh, and eighth sections of the first articles of the Act concerning corporations, approved March 19, 1845, shall not apply to this corporation"*1 (R. pp. 136-137). The Charter, in the nature of an act of incorporation, also provided that the purpose of the corporation was educational. At the time this Charter was granted, the Constitution of Missouri of 1820 was then in effect, and provided in Article XIII, Section 2 (R. p. 57): "* * * that the people of this state have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their Constitution and form of government whenever may be necessary to their safety and happiness." Acting under that charter, respondent University began operation.

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*1—The pertinent part of the sections referred to provides:
"The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension or repeal in the discretion of the legislature." (Chapter 34, Article I, Sec. 7, R. S. Mo. 1845.) (R. p. 54.)

On July 4, 1865, long before respondent University acquired any property in Kansas City, Missouri, the people of Missouri adopted a new Constitution which provided in Article IV, Section 25, that the General Assembly should not pass special laws exempting any property of any named person or corporation from taxation (R. p. 58). Pursuant to this provision the legislature provided for the taxation of all property belonging to eleemosynary corporations except that expressly exempt from taxation by the constitutional provisions (R. p. 16). The taxed property in question was not within this exemption.

In 1866, Rowse, the collector of revenue of St. Louis County, assessed taxes against the property of the University in St. Louis County. The University enjoined the collection of these taxes on the grounds that its charter was an irrevocable contract exempting its property from taxation forever. The Supreme Court of the State of Missouri held (*Washington University* v. *Rowse*, 42 Mo. 308) that the charter provision did not impose a contractual obligation upon the state, and that at the most it was a revocable privilege * * * that, therefore, St. Louis could tax the real property of respondent, Washington University.*2 The Missouri Supreme Court specifically ruled that there was nothing in the transaction

*2—*Washington University* v. *Rowse*, 42 Mo. 308, l. c. 316:
"The charter is unusual and of marked peculiarity. There is no preamble to the act, and no limit to its duration or to the amount of property which it may hold. No obligations are cast upon the corporation; it stipulates for nothing, and agrees to give no consideration whatever for the extraordinary privileges thus granted. The intention was, we suppose, to establish an institution of learning, but there is nothing to prevent the corporation from accumulating and absorbing millions of wealth, and there is no corresponding obligation imposed to compel it to carry out any contemplated object."
And again, at l. c. 319, the Missouri Supreme Court held:
"An act, without any consideration passing between the parties, providing that lands never should be taxed, would have only the force and effect of an ordinary law simply exempting them from taxation, which might be repealed by any subsequent Legislature."

that amounted to consideration, an essential of every contract. This was but a reannouncement of the doctrine of an earlier Missouri Supreme Court case, *The City of St. Joseph* v. *Hannibal & St. Joseph R. R. Co.*, 39 Mo. 476, that the consideration for the grant must be expressly included in the grant of exemption. Respondent University appealed from this decision to the United States Supreme Court on the ground that its Charter constituted a contract with the State of Missouri and that it was protected under Article I, Section 10, of the Constitution of the United States against this alleged impairment of its contract by the State of Missouri. The United States Supreme Court upheld this contention of rspondent University in a four to three decision a*Washington University* v. *Rowse*, 75 U. S. 439) and declared that Article IV, Section 25, of the Missouri Constitution of 1865 was invalid as in violation of said Federal constitutional provision. A strong dissenting opinion by Mr. Justice Miller, concurred in by Chief Justice Chase and Mr. Jusice Field, on principle sustained the right of St. Louis to tax respondent's property situated in St. Louis, Missouri.*3 Mr. Justice Miller there stated, l. c. 444:

> "We are strengthened in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it

*3—*Washington University* v. *Rowse*, 75 U. S. 439, l. c. 443:
"We do not believe that any legislative body, sitting under a State constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

has never received the full assent of this Court; and referring to these dissents for a more elaborate defense of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned."

The majority opinion was premised upon the then rule of the United States Supreme Court that there was a federal common law, as then established by the case of *Swift* v. *Tyson*, 16 Peters 1, and which since has been recently overruled by *Erie* v. *Tompkins*, 304 U. S. 64. Premised upon the now overruled Swift case, this Court held by its four to three majority, first: that the United States Supreme Court would, independent of any state decision, *and without regard to the then settled law of this state*, decide whether or not there was consideration present in the transaction wherein respondent University received its charter from the State of Missouri through its legislature; and secondly: that under the here stated circumstances the State of Missouri had contracted away forever its inherent power of taxation so far as any property owned by respondent was concerned. That Court then reversed the opinion of the Missouri Supreme Court and ordered it to act in accordance with its overruling opinion. Petitioner asserts that the decision of the case of *Washington University* v. *Rowse*, 49 Mo. 308, so overruled, was the last expression of the independent judgment of the Missouri Supreme Court in regard to the force and the effect this claimed charter exemption as a contract.[*4]

[*4] See opinion of Missouri Supreme Court in instant case (*Washington University* v. *H. J. Gorman et al.*, decided January, 1941, and not yet reported (Record p. 177), wherein the Court said:

"There can be no question but that the decision of the United States Supreme Court in the University's case against Rowse is today the law and is commandingly decisive of this case. We *must* abide by it now as we did in *Washington University* v. *Baumann*." (Emphasis ours.)

On October 30, 1875, the people of Missouri again adopted a new Constitution (still in effect) which provided, among other things, that "all laws exempting property from taxation, other than the property above enumerated, shall be void (Article X, Section 7, Constitution of Missouri) (R. p. 11). It is admitted by respondent that its property here in question does not come within the exemption to the above constitutional provision[*5] prohibiting tax exemptions. Also by general statute the Missouri legislature in pursuance of the above constitutional provision designated certain class exemptions, which exemptions respondent concedes do not apply to it.

At present respondent University owns a vast amount of income producing real estate (which property is not devoted directly to educational use). In recent years, and long subsequent to 1875, respondent has acquired much real estate located in Kansas City, Missouri. By virtue of respondent's contention that the constitutional and statutory provisions of the State of Missouri above set out, as applied to it are null and void, as being contrary to and in violation of Section 10 of Article I of the Constitution of the United States, it has attempted to withdraw forever that property from the tax rolls of petitioner, and also any other property it may acquire in the future in Kansas City, Missouri.

[*5]—Article X (Missouri Constitution):

"Sec. 6—*Property exempt from taxation.* The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agriculture or horticultural societies: *Provided*, that such exemption shall be only by general law.

"Sec. 7—*Other exemptions void.* All laws exempting property from taxation, other than the property above enumerated, shall be void."

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, 937; 28 U. S. C. A., Section 344.

Questions Presented.

Two questions are presented, each independent of the other.

First Question: Whether or not the case of *Washington University* v. *Rowse*, 75 U. S. 439, premised, petitioner's believe, upon the rule of *Swift* v. *Tyson*, 16 Peters 1, and now overruled by *Erie* v. *Tompkins*, 304 U. S. 64, still absolutely prohibits the Supreme Court of the State of Missouri from following the settled law of the State of Missouri that there is no consideration in the charter granted by the State to respondent University as announced in its last independent opinion (*Washington University* v. *Rowse*, 42 Mo. 308), and whether the former Rowse decision still forces the Supreme Court of Missouri to follow the general federal common law upon that subject as decided by the United States Supreme Court in 1867 in a four to three decision, and premised, petitioners believe, upon the *Swift* v. *Tyson* doctrine recently abandoned by this Court. That is, is the Missouri Supreme Court still forced to follow the federal common law as to what is consideration, even though *Erie* v. *Tompkins* declares that the federal courts must follow the state law?

Second Question: Even if the first question should be determined contrary to petitioner's earnest conception of the effect of the newly decided *Erie* v. *Tompkins* case,

this Court should determine whether or not the ancient federal decision in the Rowse case that there was consideration (decided in 1867 in a four to three opinion, and whose strong dissent pointed out the weakness and error of the majority opinion, and stated that it was a doctrine long dissented from and one that must be finally abandoned by this Court) present in the transaction whereby Washington University received its charter from the Missouri legislature should still be the law so as to invalidate Article X, Sections 6 and 7, of the Constitution of Missouri of 1875.

Reason for Granting the Writ.

The discretionary power of this Court to grant a writ of certiorari (under Section 237b of the Judicial Code) is urged and invoked upon the following grounds and for the following reasons:

First: The decision of the Supreme Court of Missouri gives an erroneous interpretation to the effect of this Court's recent decision in the case of *Erie* v. *Tompkins*, 304 U. S. 64, in this:

The Erie case holds, in effect, that there is no federal common law and that the Supreme Court of the United States is now bound by *either* the statutes of the state or the law of the state as announced by the decisions of its highest courts. The Erie case excepts matters affecting violations of the federal constitutional provision prohibiting the impairment of contracts, holding that this Court must decide for itself whether or not there has been an impairment of a contract. However, in determining whether or not there is a contract, this Court, under the Erie decision, is bound by the decision of the Supreme Court of the state as to what are the constituent

elements of a contract, as here, what are the elements constituting legal consideration so as to make a binding contract. If the state courts' decision on this is not wholly arbitrary and not wholly without reason, this Court must accept it. The determination as to the existence of a contract must be made in the light of the law of the state involved. Yet in the Rowse case, decided over 70 years ago, in order to find the element of consideration essential to an enforceable contract resort was had to a "federal common law" rule of construction by which consideration was *presumed* from the mere enactment of the legislation with a purpose declared to be beneficial to the state.

This federal ruling, originally announced in the Dartmouth College case, was contrary to the well-settled law of this state as last declared by the Missouri Supreme Court in *Washington University* v. *Rowse*, 42 Mo. 308. Since it was upon the theory of *Swift* v. *Tyson* that the settled law of the Supreme Court of Missouri was rejected by the four to three opinion of the Federal Supreme Court, and since *Erie* v. *Tompkins* has held that there is no such thing as a federal common law, and the Federal Courts are required to apply the laws of the state where the cause of action arose (recognized also by the case of *Ruhlin et al.* v. *N. Y. Life Ins. Co.*, 304 U. S. 202), the Rowse decision should be declared to be no longer binding upon the Missouri Supreme Court.

Second: Under its repeatedly announced right to correct an erroneous decision, this Court should review and correct the doctrine announced in the original Rowse case, decided by this Court in a four to three decision, over 70 years ago, under entirely different circumstances from those now obtaining. This Rowse decision, which held unconstitutional Article IV, Section 25, of the Con-

stitution of Missouri of 1865, and a statute of this state passed in conformity therewith, did so on a doctrine that has always been strongly dissented from as one which must be finally abandoned on its merits. As stated by Mr. Justice Miller and concurred in by Chief Justice Chase and Mr. Justice Field, in the dissent in that case, the following basically compelling reasoning calls for a reversal of the majority opinion:

> "We do not believe that any legislative body, sitting under a State constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. While under such forms of government, the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

In addition to the above set out reasons for the reversal of the Rowse case, we wish to point out that at the time the Rowse case was presented to this Court there was a failure on part of counsel to present to this Court for consideration Article XIII, Sec. 2, of the Missouri Constitution, in effect when respondent's Charter was granted, and providing that the people of the State of Missouri had the inherent and sole right to regulate the internal government and to alter and abolish their Constitution whenever necessary to their safety and happiness.

Since the Rowse case, there has been a growing tendency on the part of this Court to accept the decision of the highest court of the state upon this type of question where it cannot be said that its decision was in itself unreasonable or in violation of the plain language of a federal statute or the federal Constitution.*6 This trend culminated in the Erie decision. Since the Rowse decision by this Court, Missouri has again changed her Constitution and her laws so as to in both instances declare respondent University's property now to be subject to taxation (Constitution of 1875, Article X, Sections 6 and 7) (R. p. 11) Section 9742, Revised Statutes of Missouri 1879 (R. p. 12). In view of the expressed changed opinion of this Court and in view of the fact that Missouri has by a new Constitution sought to tax this property, this Court should entertain this case on its merits and rule that this property is subject to taxation. In the original Rowse decision this Court refused to give any weight to the then settled law of Missouri as announced by its highest state court.

Third: The Erie case and the Ruhlin case have been erroneously interpreted by the Supreme Court of Missouri and thus has left in confusion an important and far-reaching question of federal law. The only other state to have passed upon this question in the short time since the Erie case is the State of New Hampshire. That state, through its highest court, in the case of *Phillips Exeter*

*6—See *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662, wherein Mr. Justice Peckham declared, l. c. 64, 65:

"* * * Great weight ought also be attached to the decision of a state court regarding questions of taxation or exemption therefrom under the Constitution or laws of its own state. * * * The decision of the state court is entitled to exercise marked influence upon the question this court is called upon to decide and where it cannot be said that the decision is in itself unreasonable or in violation of the plain language of the statute, we ought, in cases engendering a fair doubt, to follow the state court in its interpretation of the statutes of its own state." To same effect see also *Wilson* v. *Standiffer*, 184 U. S. 399, 412; *Millsaps College* v. *City of Jackson*, 275 U. S. 129."

Academy v. *Exeter*, 11 Atl. (2d) 569, held exactly contrary to the Missouri Supreme Court in the instant decision.*B This clearly reveals the existing confusion on this all-important federal question.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued to the Supreme Court of the State of Missouri to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Supreme Court of the State of Missouri be reversed; all based on the grounds and reasons hereinbefore recited.

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JERRY T. DUGGAN,
ELMO B. HUNTER,
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---

*B—"The court reviewed prior decision in the State of New Hampshire on the questions involved and determined that it was beyond the power of the Legislature to grant a perpetual exemption from taxation and that therefore the provision purporting to grant such an exemption was at most a grant of revocable privileges. The decision commented upon the effect of the doctrine of the Erie Railroad case, *supra*, as follows, l. c. 579:

"'The federal constitution requires no enforcement of invalid contracts and the states, and not the nation, now determine between valid and invalid contracts. Upon the issue of construction of state legislation, the state's own common law now controls, even when federal jurisdiction may be asserted in passing upon it. The theory of a common law of the nation, adopted in *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L. Ed. 865, has been abandoned by the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. The federal courts now follow a state's own judicial construction of all its laws not involving federal authority. Decision of the validity of the plaintiff's exemption as irrevocable is therefore to be reached by determination of the local law.'

"And again, l. c. 584:

"'Throughout the course of judicial thought in the state, doubts and disapproval of any alienation of the taxing power have been expressed, a natural reluctance to guide the future in view of the serious effect on accrued situations may partly explain the avoidance of definite statement. But the chief reason is the federal rule adopting a mythical common law of the nation in place of local law, which operated to blockade decision of the local law. The rule being no longer extant, state courts may now apply their own law and the federal courts will employ it as controlling.'"

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Supreme Court.

The judgment of the Supreme Court of Missouri and the opinion of that Court, both stating that the Supreme Court of Missouri is still bound by the 73-year-old case of *Washington University* v. *Rowse*, 75 U. S. 439, and misinterpreting the effect of this Court's decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 74, appears in the record at pages 172-183, inclusive. This opinion is not yet officially reported.

II.

Jurisdiction.

Jurisdiction is conferred upon this Court to review this cause by writ of certiorari, under Section 237b of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 936, 937; 28 U. S. C. A. Sec. 344. The date of the application for the writ may be taken as the date of the filing of the petition in the office of the clerk of this Court.

III.

Statement of the Case.

A statement of the case is set forth in the foregoing petition under the caption "Summary and short statement of the matters involved," to which reference is hereby made.

IV.

Specifications of Error.

1. The Supreme Court of Missouri erred in holding that it was absolutely bound by and must conform to the opinion of this Court in *Washington University* v. *Rowse*, 75 U. S. 439.

2. The Supreme Court of Missouri erred in its interpretation of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, in that it held that that case does not allow to the Supreme Court of Missouri the right to determine the question of whether or not a certain transaction contained all of the elements of a contract so as to bind the parties thereto.

3. The Supreme Court of Missouri erred in affirming the judgment of the trial court in enjoining and restraining petitioners herein from assessing any general city taxes against any of the respondent's property, for the reason that the people of Missouri, through both their Constitutions of 1820, Article XIII, Sec. 2 (R. p. 63), and of 1865, Article IV, Sec. 25 (R. p. 58), have caused respondent's land to be subject to taxation by petitioners, and the Supreme Court of Missouri, by misinterpreting this Court's decision in both *Washington University* v. *Rowse* and *Erie Railroad Co.* v. *Tompkins* has ruled that this Court has given to the transaction described in the petition herein, the qualities of an irrevocable and perpetual contract protected by the Federal Constitution, Article I, Sec. 10.

4. The Supreme Court of Missouri has erred in holding that Secs. 6 and 7, of Article X, of the Constitution of 1875 does not cause respondent's property to be subject to taxation by petitioner, for the reason that the Missouri Supreme Court has held that it is bound by the opinion of this Court in *Washington University* v. *Rowse*,

decided in 1867, even though the doctrine of that case has been specifically repudiated by both the cases of *Erie Railroad Co.* v. *Tompkins, supra,* and *Ruhlin et al.* v. *New York Life Ins. Co.,* 304 U. S. 202.

5. Lastly, the opinion of the Supreme Court of Missouri is directly contrary to and in conflict with the decisions of this Court in *Erie Railroad Co.* v. *Tompkins, supra,* and *Ruhlin et al.* v. *New York Life Ins. Co., supra,* and, last, the Supreme Court of Missouri has erred in holding that it is bound by the case of *Washington University* v. *Rowse, supra,* and in ruling that it does not have the right to determine this cause as of this time, upon its merits.

V.

Argument.

The Missouri Supreme Court has in its decision of this case erroneously failed to recognize the effect of the decision of this Court in the case of *Erie Railroad Company v. Tompkins.*

The four to three decision of this Court in the case of *Washington University* v. *Rowse,* 75 U. S. 439, is cited in the opinion of the Missouri Supreme Court and declared to be "the law," and "commandingly decisive of this case" (R. p. 177). The state court is of the opinion that it still cannot, in the face of the majority opinion of this Court in the Rowse case, *supra,* declare as a matter of substantive law, whether or not there was any legal consideration for the grant of tax exemption which was bestowed upon the university in 1853 by the Missouri State Legislature.

The history of this special tax exemption enactment by the Missouri Legislature, presents, in the light of sub-

sequent amendments of the Constitution of the State of Missouri a graphic illustration of the evil and disastrous effect of a doctrine announced in *Swift* v. *Tyson*, 16 Peters 1, which doctrine this Court has recently renounced in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64. In *Washington University* v. *Rowse*, *supra*, decided seventy years ago, four of the seven members of the United States Supreme Court, acting in harmony with the doctrine of *Swift* v. *Tyson*, *supra*, applied a rule of the "mythical" Federal Common Law by which consideration for the grant of tax exemption was presumed from the mere enactment of the legislation with a purpose declared to be beneficial to the state. This majority opinion reversed outright a decision by the Supreme Court of Missouri (*Washington University* v. *Rowse*, 42 Mo. 308) which declared, as a matter of state law, that there was no consideration for this grant and that it was, at most, a revocable privilege. The settled law of this state in regard to what constitutes consideraion for a binding contract was thus replaced by presumption in conformity with what was then a rule of the Federal Common Law.

We readily acknowledge the principle that this Court will, in cases in which the protection of Section 10 of Article I of the Constitution of the United States is invoked, form its own judgment as to the existence and construction of the alleged contract. It is, however, our contention that, since the recent decision of this Court in *Erie Railroad Co.* v. *Tompkins*, *supra*, this judgment will be based upon the law of the state as declared by its highest court as to what constitutes the various constituent elements of a contract. The "Federal Common Law" has been abolished and the Supreme Court of Missouri is therefore no longer obliged to recognize as

binding, a decision of this Court which was based upon the "Federal Common Law."

This phase of the effect of the Erie Railroad Company case has never before been presented to this Court. There is only one reported case in which the identical question herein involved has been passed upon by a state court (*Phillips Exeter Academy* v. *Exeter*, 11 Atl. [2d] 569). In this case the Supreme Court of the State of New Hampshire held that the question of whether or not there was consideration for a grant of tax exemption by a state legislature to a private educational institution, was for the determination of the state court. This decision, in its result at least, does, in our opinion, correctly determine the effect of *Erie Railroad Company* v. *Tompkins*, upon the state court's power and right to disregard the decision of this Court in the Rowse case, *supra*, and to re-examine and determine for itself, the identical issue now raised in the case at bar. The Supreme Court of Missouri has, however, held to the contrary. This conflict can be resolved only by the opinion of this Court. The matters involved in this case are of extreme importance to the people of the State of Missouri. The contention of the University that all of its property, whenever acquired and whatever its use, is perpetually free from taxation, would, if sustained, abridge the power to tax which is inherent in the people of the state. The basis for this contention, therefore, merits the closest scrutiny of this Court.

II.

The majority opinion in the case of *Washington University* v. *Rowse*, (75 U. S. 439) is erroneous and should be reversed by this Court.

In the event that this Court should not sustain the contention which we have made in Point I of this brief, we urge the Court to re-examine the majority opinion in the case of *Washington University* v. *Rowse* (75 U. S. 439). The Supreme Court of Missouri, on the theory that it was bound to follow the decision of the United States Supreme Court in the Rowse case, refused to consider the contentions which we presented to that court which go directly to the merits of this controversy. Unless, therefore, this Court will re-examine the Rowse case and consider this cause on its merits, the petitioners will be denied the right to have these matters adjudicated. This Court has repeatedly declared that it reserved the right to correct an erroneous decision. We again call the Court's attention to the dissenting opinion of Mr. Justice Miller, in the Rowse case, in which it was predicted that the majority opinion would some day be overruled (quoted at p. 4 of the petition herein). We are confident that, upon a re-examination of the principles involved, this prediction of Mr. Justice Miller will be fulfilled. The reasons we consider the majority opinion of this Court in the Rowse case erroneous are, briefly, as follows:

1. The Charter granted to the University in 1853 was not a contract. It was a grant of privileges which could be withdrawn by the Legislature or by the people of this state. There was no legal consideration for the grant and, therefore, there was no contract which could be impaired. The constitutional provisions of 1865 (R. p. 58) and of 1875 (R. p. 11) effectively withdrew the grant of tax

exemption and rendered all property held by the University subject to taxation. This was the settled law of the State of Missouri prior to the decision of *this* Court in the Rowse case (*Washington University* v. *Rowse*, 42 Mo. 308, and *City of St. Joseph* v. *Hannibal & St. Joseph Railroad Company*, 39 Mo. 476), and this is the law of New Hampshire as held in the recent decision of the Supreme Court of that state in the case of *Phillips Exeter Academy* v. *Exeter*, *supra*.

2. It was beyond the power of the Legislature to grant a perpetual exemption from taxation. The power to tax is inherent in a sovereign state and, therefore, the legislature of 1853 representing possibly the then current popular will could not lawfully abridge this power by granting a perpetual exemption from taxation. In a democratic government, sovereignty and all of its attributes, including the power of taxation, is vested in the people of the state. It is inconsistent with these fundamental principles to hold that any one of the biennial state legislatures may deprive all succeeding generations of the power to tax certain property. (See quotation from opinion in *Washington University* v. *Rowse*, 42 Mo. 308, at p. 3 of petition herein, and *Washington University* v. *Rowse*, 75 U. S. 439, quoted at p. 4 of petition herein.)

In addition to the above contentions which were presented to this Court in the Rowse case, we submit the following propositions which were not urged in the Rowse case in either the Missouri Supreme Court or in this Court:

1. Assuming for the purpose of argument only that the Charter grant of tax exemption was a contract, it is fundamental that constitutional provisions, and provisions of the general law, which were in force at the time of

the grant must be considered part of the contract. The Constitution of 1820, Article III, Section 2, provided:

> "That the people of this state have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness."

The contract, therefore, was entered into subject to the reserved right of the people of the State of Missouri to change their constitution. This right was exercised by the people of the State of Missouri in 1865 and again in 1875. The constitutional provisions then adopted had the effect of repealing the tax exemption of the university.

Chapter 34 of the Revised Statutes of Missouri, 1845, provided, Article I, Section 7 (R. p. 54):

> "The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

This reserved right was exercised by the legislature in enacting the taxing statutes which were involved in the case of *Washington University* v. *Rowse, supra.* The statutory provisions above quoted must also be considered a part of the contract and removes from the contract the element of irrevocability which is necessary before a contract is protected by Article X of Section 2 of the Federal Constitution. *Northern Central Railway* v. *Maryland,* 187 U. S. 258, l. c. 267:

> "In considering this question it will be borne in mind that it is elementary that where the constitution of a State reserves the right to repeal, alter or

> amend, all charters granted by the legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential to bring them within the intendment of the clause of the Constitution of the United States protecting contracts from impairment. The cases supporting this doctrine are so numerous that they need not be cited."

That the effort upon the part of the legislature of 1853 to except the university charter from the operation of the section of the general law above quoted was invalid was decided by the Missouri Supreme Court in the case of *Washington University* v. *Rowse*, in which it was said, l. c. 325:

> "No importance or weight can be attached to that provision of the charter of defendant in error which excludes it from the operation of the 7th section of the general law in relation to corporations."

These two provisions, one constitutional and the other statutory, had the effect of reserving to the people and to the legislature, the power to alter or repeal the charter of the university.

2. It is our contention that Sections 6 and 7 of Article X of the Constitution of the State of Missouri of 1875, had the effect of repealing the charter exemption from taxation as to *all property acquired by the university after the effective date of this constitution*. (These two sections are set out in full at p. 6 of the petition herein.) This constitution was adopted after the decision of this Court in the Rowse case for the obvious purpose of curtailing the further acquisition of property and the holding of such property free from taxation by Washington University and other corporations who had theretofore ob-

tained charter exemptions from taxation from the legislature of the state. That such was the purpose of the framers of this constitution was recognized by the Supreme Court of Missouri in the case of *State ex rel. Ziegenhein* v. *Missouri Free School*, 162 Mo. 382, 62 S. W. 998.

The record in this case (pages 150, 151, 152) discloses that the property in controversy was acquired by the University long after the adoption of the Constitution in 1875. The University had no vested right in the exemption of this property from taxation. The determination of the people of the State of Missouri, as disclosed by these constitutional provisions, to put a stop to the further withdrawal of property from the tax rolls of the state and its municipalities, should be permitted to have the intended effect. The most solemn and binding manner by which the will of the people of a sovereign state may be expressed, is by and through their constitution, and their obvious intent as disclosed by this instrument cannot be disregarded.

Conclusion.

In conclusion, we wish to call the court's attention to the situation which has resulted from the continuation of the alleged tax exemption of the University. There is no limitation placed upon the amount of property which may be withdrawn from taxation by the University. The purpose of the granting of tax exemption has been served. It is conceded that the University is now a tremendously wealthy institution. It is the owner of many millions of dollars worth of revenue producing property and is certainly capable of bearing its fair share of the tax burden of the state and its municipalities. Other colleges and

universities in this state are carrying their share of the tax burden on land held by them solely for revenue purposes. The record discloses, for example, that St. Louis University, located in the same city as respondent, became the co-owner of real estate in Kansas City, Missouri. St. Louis University paid taxes to Kansas City on this business property on her one-half interest. Respondent did not. Then St. Louis University sold her interest to respondent and respondent now attempts to withdraw the entire tract from petitioner's tax rolls (R. pp. 151, 152).

We, therefore, respectfully urge this Court to grant the petition herein so that your petitioners will not be deprived of the right to have the important matters involved in this case adjudicated. We have not, in this argument, burdened the Court with the citation of numerous authorities, but have attempted only to present briefly the questions involved.

Respectfully submitted,

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of Kansas City, Missouri,
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CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

October Term, 1941.

No. 711.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK MCCABE, City Assessor of Kansas City, Missouri, *Petitioners*,

vs.

THE WASHINGTON UNIVERSITY, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONERS' BRIEF.

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In the

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H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri, *Petitioners*,

vs.

THE WASHINGTON UNIVERSITY, *Respondent*.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONERS' BRIEF.

I.

The Opinion Below.

The opinion of the Supreme Court of the State of Missouri apears in the record beginning at page 131 and is reported in 153 S. W. (2d) 35 (not yet officially reported).

II.

Statement of Grounds on which Jurisdiction of this Court Was Invoked.

This cause is before this Court upon writ of certiorari issued by this Court to the Supreme Court of the State of Missouri under authority of Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 937, 28 U. S. C. A., Sec. 344.

III.

Constitutional Provisions and Statutes Involved.

The defense of the petitioners here and defendants below is based upon the following constitutional and statutory provisions:

1. Section 2 of Article XIII of the Constitution of Missouri of 1820 (R. 50), reserving to the people of the State of Missouri the exclusive right of altering and abolishing their Constitution and form of government.

2. Section 7 of Article I of Ch. 34 of the Revised Statutes of Missouri, 1845 (R. 48), providing that the charter of every corporation thereafter granted by the Legislature should be subject to alteration, suspension and repeal.

3. Section 16 of Article XI of the Constitution of the State of Missouri of 1865 (R. 50), declaring all property in the state to be subject to taxation except that specifically exempted by the Constitution.

4. Sections 6 and 7 of Article XI of the Constitution of the State of Missouri adopted in 1875 (R. 9-10), declaring void all exemptions except those specifically enumerated in the Constitution.

5. Sections 9742 and 9743, R. S., Mo., 1929 (R. 10), now Sections 10936 and 10937, R. S., Mo., 1939, prohibiting the exemption of property from taxation except those classes of property therein specifically enumerated.

The respondent herein contends that the aforementioned provisions of the Constitution of 1865 and that of 1875 and the statutory provisions enacted pursuant thereto are violative of Section 10 of Article I of the Constitution of the United States (R. 10) as applied to the taxation of the property here involved.

IV.

STATEMENT OF THE CASE.

This was an action brought by the respondent, Washington University, of St. Louis, Missouri, to enjoin the petitioners, the Treasurer and the Assessor of Kansas City, Missouri, from levying and collecting real estate taxes on property located in Kansas City, Missouri, owned by the respondent.

Upon trial of the case in the Circuit Court of Jackson County, Missouri, an injunction was granted. Your petitioners took an appeal to the Supreme Court of Missouri, which court affirmed the judgment of the trial court, making permanent the injunction. Following this decision, petition for certiorari was granted by this Court.

It is the contention of the respondent University that the property here involved is exempt from taxation by reason of a provision contained in the charter granted to the Eliot Seminary by the Legislature of the State of Missouri in 1853. The tax exemption provision of this charter is as follows:

> "All property of said corporation shall be exempt from taxation and the sixth, seventh and eighth sections of the first Article of the Act concerning corporations, approved March 19th, 1845, shall not apply to this corporation." (R. 48.)*

In 1857, the name of the original grantee was changed to "The Washington University" by legislative amendment to the original charter (R. 5-7). At the time the

*Section 7 referred to is as follows:
"The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension or repeal in the discretion of the legislature." (Ch. 34, Art. I, Sec. 7, R. S., Mo., 1845.)

original charter was granted to Eliot Seminary and at the time this charter was amended, the Constitution of Missouri of 1820 was in full force and effect. Section 2 of Article III of this Constitution (R. 50) provided:

> "* * * That the people of this state have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness."

In 1865, the people of the State of Missouri adopted a new Constitution which provided (Sec. 25) that the General Assembly should not pass special laws exempting any property of any named person or corporation from taxation (R. 12). Thereafter, the Legislature provided for the taxation of all property belonging to eleemosynary corporations except that which was expressly exempted from taxation by the provisions of the Constitution of 1865. It is not contended by the respondent herein that the property in question is within the exemptions provided for in this Constitution.

Immediately after the adoption of the Constitution above referred to, one Rowse, of St. Louis County, assessed taxes against the property of Washington University located in St. Louis County. The University sought to enjoin the collection of these taxes on the theory that its charter was a contract within the protection of Section 10 of Article I of the Federal Constitution. This contention was rejected by the Supreme Court of Missouri and it was held by said court that the charter of the respondent was not a contract because there was no consideration for the legislative grant (*Washington University* v. *Rowse*, 42 Mo. 308). The respondent appealed from this decision to the United States

Supreme Court, and this Court in a four to three decision held that consideration for the grant of tax exemption was to be presumed from the purposes to be accomplished by the corporation, and held that the resultant contract was within the protection of the "contract clause" of the Federal Constitution (*Washington University* v. *Rouse*, 75 U. S. 439). This case was decided concurrently with the case of *Home of the Friendless* v. *Rouse*, 75 U. S. 430, and the opinion of the majority in the two cases was based upon identical principles.

In 1875, the people of the State of Missouri again adopted a new Constitution which provided (Art. X, Secs. 6 and 7) (R. 9-10) that certain property should be exempt from taxation and that all other exemptions should be void.*

The respondent does not contend that any of the property here involved is exempt from taxation by virtue of Section 6 of Article X of this Constitution, nor does respondent deny that these two constitutional provisions, if valid, have the effect of repealing the respondent's alleged exemption from taxation.

All of the property involved in this action was acquired by the respondent subsequent to the adoption of the Constitution of 1875.

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*Article X (Missouri Constitution):

"Sec. 6—*Property exempt from taxation.* The property, real and personal, of the state, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, also, such property, real or personal, as may be used exclusively for agriculture or horticultural societies: *Provided*, that such exemption shall be only by general law.

"Sec. 7—*Other exemptions void.* All laws exempting property from taxation, other than the property above enumerated, shall be void."

V.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Missouri erred in holding that it was bound by the opinion of the majority of this Court in *Washington University* v. *Rouse*, 75 U. S. 439, in determining the instant case.

2. The Supreme Court of Missouri erroneously failed and refused to recognize the effect of the decision of this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64, upon the determination of the instant case.

3. The Supreme Court of Missouri, deeming *Washington University* v. *Rouse, supra*, as controlling, erred in holding that the charter of the respondent is a contract protected by the "contract" clause of the Federal Constitution.

4. The decision of this Court in the case of *Washington University* v. *Rouse*, 75 U. S. 439, upon which the decision in the Supreme Court in the instant case was based, is erroneous and should be overruled.

ARGUMENT.

I.

The decision of the Missouri Supreme Court is contrary to the principles established by this Court in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64.

The contention of the respondent Washington University that the Missouri Supreme Court was bound to follow the decision of this Court in the case of *Washington University* v. *Rouse*, 75 U. S. 439, in determining that the charter of the respondent constituted a contract, was sustained by the Missouri Supreme Court in its decision of the case at bar, *Washington University* v. *Gorman*, 153 S. W. (2d) 35 (not yet officially reported). The Missouri Supreme Court resolved the question of the law to be applied in the instant case in the following language:

> "There can be no question but that the decision of the United States Supreme Court in the University's case against Rowse is today the law and is commandingly decisive of this case. We must abide by it now as we did in *Washington University* v. *Baumann, supra.*"

In the majority opinion of the United States Supreme Court in the case of *Washington University* v. *Rouse*, the Court applied what was termed "the well-settled doctrine of this Court" in determining that the charter of the respondent was a contract. "The well-settled doctrine" referred to was the doctrine of a presumed consideration applied in the *Dartmouth College* case, 4 What. 518, as this case was construed by this Court in *Home of the*

Friendless v. *Rouse*, 75 U. S. 430, l. c. 437, decided concurrently with *Washington University* v. *Rouse*, *supra*, in which latter case the principles announced in the former were adopted by reference. In the *Home of the Friendless* case, the Court said, l. c. 437:

> "There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well-settled doctrine of this court on this subject since the case of *Dartmouth College* v. *Woodward*."

Thus upon this theory of supplanting the law of a state with a federal common law rule, the decision of the Missouri Supreme Court as to what constitutes consideration for a binding contract was overruled.

At the outset, let it be conceded that the United States Supreme Court, in cases where the protection of the constitutional provision against impairment of contracts is invoked, must determine for itself the nature and existence of the alleged contract. It is, however, our contention that since the decision of this Court in the case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, the independent judgment of this Court must be exercised in the light of the law of the state as declared by its highest court, as to the facts necessary to constitute the essential elements of a contract, and as here, as to what facts are necessary to constitute a legal consideration that will support a binding contract. If the state court's decision on such matters is not wholly arbitrary and contrary to reason, this Court must accept it in determining the existence of

a contract. This, we think, is true in all cases including those cases in which the constitutional prohibition against impairment of contracts is involved.

Specifically, our contention is that the law which is to be applied in determining whether or not the charter grant of tax exemption to the respondent is contractual, is the law of the State of Missouri, as declared in the opinion of Judge Wagner of the Missouri Supreme Court in the case of *Washington University* v. *Rouse, supra.* The Court there said (l. c. 316):

> "The charter is unusual and of marked peculiarity. There is no preamble to the act, and no limit to its duration or to the amount of property which it may hold. No obligations are cast upon the corporation; it stipulates for nothing, and agrees to give no consideration whatever for the extraordinary privileges thus granted. The intention was, we suppose, to establish an institution of learning, but there is nothing to prevent the corporation from accumulating and absorbing millions of wealth, and there is no corresponding obligation imposed to compel it to carry out any contemplated object."

This is tantamount to a judicial determination by the highest court of Missouri that "the public purposes to be attained" by the incorporation of the grantee (which was held by the United States Supreme Court in the Rouse case to constitute consideration) did not constitute a valid consideration.

The Erie Railroad decision, *supra,* has unequivocally repudiated the doctrine of a federal common law. Since that decision, this Court, in determining whether or not the charter of the respondent University is a contract, should apply the rule of law announced by the Supreme Court of Missouri in *Washington University* v. *Rouse, supra,* as to what constitutes the element of considera-

tion, said decision being the last free and independent expression of the Missouri Supreme Court on this question. The confusion incident to two rules of common law, state and federal, which was terminated by the decision in the Erie Railroad case would, upon the contention of respondent and in the recent opinion of the Supreme Court of Missouri, be continued in the construction of contracts where the constitutional provision against impairment is involved. We urgently submit that the doctrine of the Erie Railroad case applies to the construction of a contract, even where the contract provision of the Federal Constitution is involved.

Mr. Justice Brandeis, in an opinion in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, said (l. c. 78):

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

The exception in the first phrase of the paragraph quoted above forms the basis for respondent University's contention that all the matters involved in this case are still governed by a "federal common law rule" as applied in this Court's decision in the Rouse case, *supra*. Under respondent's contention, a contract which is alleged to have been impaired would, regardless of the fact that the theory of a "federal common law" has been abolished, be tested by the principles of what was formerly regarded

as the common law of the nation. A construction of the same contract, if no question of impairment were involved, would unquestionably be governed by the state law. An approval of respondent's position would thus perpetuate the evils of confusion and lack of uniformity which were sought to be eliminated by the decision of the Erie Railroad case, *supra*. The exception ("* * * matters governed by the Federal Constitution or by Acts of Congress") relied upon by respondent University, should, on the contrary, be construed so as to effectuate the principles of the Erie Railroad decision. The words, "except in matters governed by the Federal Constitution or by Acts of Congress," do not, in our opinion, affect the applicability of the decision in the Erie Railroad case to the case at bar.

If not expressly, certainly by unequivocal inference, this Court declared in the Erie Railroad case, that federal courts were concluded by the decisions of state courts as to questions involving obligations under contracts entered into and to be performed within the state. In pointing out the extent to which federal courts had exercised a judgment independent of the decisions of state courts, this Court said (304 U. S., l. c. 75):

> "The discrimination resulting became in practice far-reaching. This resulted in part from a broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment. In addition to questions of purely commercial law 'general law' was held to include the obligations under contracts entered into and to be performed within the state, the extent to which a carrier operating within a state may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the state upon persons resident or property located there, even where the question of liability de-

pended upon the scope of a property right conferred by the state; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate, were disregarded."

That the doctrine of the Erie Railroad case, *supra,* is applicable to the interpretation of contract provisions, was decided by this Court in the case of *Ruhlin et al.* v. *The New York Life Ins. Co.,* 304 U. S. 202, l. c. 205:

"It was stated in *Carpenter* v. *Providence Washington Ins. Co.,* 16 Pet, 495, 511, that questions concerning the proper construction of contracts of insurance are 'questions of general commercial law,' and that state decisions on the subject, though entitled to great respect, 'cannot conclude the judgment of this court.' A limitation was put on this doctrine in *Mutual Life Ins. Co.* v. *Johnson,* 293 U. S. 335, 340. Putting aside all questions of power, the Court interpreted a specific provision of an insurance contract in accordance with the decision of the highest court of the State of Virginia, where delivery was made. 'All that is here for our decision is the meaning, the tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one. With choice so "balanced with doubt," we accept as our guide the law declared by the state where the contract had its being.' The decision in *Erie R. Co.* v. *Tompkins, ante,* p. 64, goes further, and settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies, though the question of construction arises not in an action at law, but in a suit in equity."

To the same effect, see *New York Life Ins. Co.* v. *Jackson et al.,* 304 U. S. 261, and *Rosenthal* v. *New York Life Ins. Co.,* 304 U. S. 263.

In the following decisions of the Circuit Courts of Appeal, the decisions of the state courts have been held to be controlling in the construction of contracts:

Dayton & Michigan R. Co. v. *Commissioner of Internal Revenue*, 112 F. (2d) 627, l. c. 630.
Vero Beach v. *Rittenoure Inv. Co.*, 113 F. (2d) 269, l. c. 272 (certiorari denied, 311 U. S. 710).
Breslin v. *National Surety Co.*, 114 F. (2d) 65, l. c. 67.
Lucking v. *Schram*, 117 F. (2d) 160, l. c. 161.

Our contention that the existence of respondent's perpetual exemption from taxation and its validity as a contract must now be determined by the law of the State of Missouri, is supported by the only case decided upon this question by a state court since the *Erie Railroad* decision. We refer to the case of *Trustees of Phillips Exeter Academy* v. *Exeter*, 90 N. H. 472. The plaintiff in this action was incorporated in 1781 by act of the General Assembly of the State as an educational institution. The charter by which it was created granted to the Academy a perpetual exemption from taxation. In 1913 the Legislature passed an act repealing all special exemptions from taxation. The plaintiff in this action contended that the statute repealing tax exemptions had the effect of impairing the Academy's contract with the State, which contention the New Hampshire Supreme Court overruled. In its decision that court commented upon the effect of the *Erie Railroad* decision upon the questions involved as follows, l. c. 483:

> "The Federal Constitution requires no enforcement of invalid contracts, and the states, and not the nation, now determine between valid and invalid contracts unless a question under that constitution is presented. In all other cases, upon the issue of construction of state legislation, the state's own com-

tion law now controls, even when federal jurisdiction may be asserted in applying and enforcing it. The theory of a common law of the nation, adopted in *Swift* v. *Tyson,* 16 Pet. 1, 8, decided in 1842, has been abandoned by the case of *Erie Railroad* v. *Tompkins,* 304 U. S. 64. The federal courts now follow a state's own judicial construction of all its laws when no issue of federal authority arises, determining in independent judgment the state law only when its conflict with the federal constitution or acts of Congress is claimed. Decision of the validity of the plaintiff's exemption is therefore to be reached by determination of the local law. 'There is no federal general common law.' *Erie Railroad* v. *Tompkins, supra,* 78."

The well-considered opinion in the *Exeter Academy* case, *supra,* is in complete harmony with our contention in the case at bar, as evidenced by the following quotation therefrom (l. c. 484):

"While the declaration of local law by the courts where it is in force may be held erroneous, that law, and not some other law, is to be determined, as it is thought, to test whether a contract made subject to it is valid and creative of obligation. The rule in the *Erie Railroad* case and the rule that 'great weight' is to be attached 'to the views of the highest court of the State' upon the issue of contract obligation (*Higginbotham* v. *Baton Rouge,* 306 U. S. 535, 538, 539) are not only consonant with each other but would seem to be in substantial and virtual accord. The *lex loci contractus* being understood to be determinative of the existence and validity of a contract, and to embrace the issue of authority to enter into a contract, it is considered that it is property ascertained by treating it as a problem of local law, although the conclusion may be exceptional to the rule generally prevailing in other jurisdictions upon a like state of facts. It is thought that a state may

adopt its own judgment and policy in classifying agreements as valid contracts or void undertakings. 'The determination follows the state law.' *Texarkana* v. *Company*, 306 U. S. 188, 198."

Other pertinent portions of this opinion are to the same effect.*

This decision of the New Hampshire Supreme Court is obviously in conflict with the opinion of the Missouri Supreme Court in the instant case in that the Missouri Supreme Court in the case at bar has held that the United States Supreme Court's decision in the Rouse case, *supra*, was still "the law" and "commandingly decisive of this case." We respectfully submit that the decision in the Exeter Academy case, *supra*, correctly interprets and applies the principles announced in the Erie Railroad case, while, on the other hand, the Missouri Supreme Court, misconstruing the effect of the Erie Railroad decision, held this decision was not in anywise relevant to a determination of the issues involved in the case at bar. (See *Washington University* v. *Gorman*, 153 S. W. [2d], l. c. 37.)

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*"Although the *Erie Railroad* case does not affect the authority of the United States Supreme Court to act independently in passing on the validity of the plaintiff's exemption here in issue, it necessarily, as it is thought, affects the manner of treatment in dealing with the problem. Application of a federal common law theretofore held to exist may not be made, in view of the declaration that in fact it has never existed. As it is understood, the federal Supreme Court will now determine the local law without reference to that elsewhere or generally prevailing or to the nonexistent common law of the nation. Thus, the difference of treatment becomes material and important. It is considered that the prior decisions of the federal Supreme Court holding that special tax exemptions are valid contracts rest on a view taken of a national common law or of special local constitutional authority therefor. And the conclusion appears to follow that the cases in which those decisions were rendered are not required, or even permitted, to be accepted as authority controlling the case here."

II.

The decision of the United States Supreme Court in the case of *Washington University* v. *Rouse*, 75 U. S. 439, is erroneous and should be reversed by this Court.

The respondent, Washington University, relies upon the decision of the Supreme Court of Missouri in the case of *Washington University* v. *Gorman*, 153 S. W. (2d) 35 (not yet officially reported), which decision was bottomed upon the decision of this Court in *Washington University* v. *Rouse*, 75 U. S. 439, which was held by the Missouri Supreme Court in its decision to be "commandingly decisive" of this case.

We call the Court's attention to the fact that the Rouse case was decided by this Court more than seventy years ago and that the decision of the majority was dissented from by three of the seven Justices then sitting. Mr. Justice Miller, the writer of the dissenting opinion, which was concurred in by Mr. Justice Field and Chief Justice Chase, predicted that the doctrine announced by the majority of the Court was a doctrine that "must finally be abandoned."*

Mr. Justice Miller renewed his protest against this same doctrine in the case of *New Jersey* v. *Yard*, 95 U. S. 104, wherein he said, l. c. 114:

**Washington University* v. *Rouse*, 75 U. S., l. c. 444:

"With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened, in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it has never received the full assent of this court; and referring to those dissents for more elaborate defence of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned."

> "The writer of this opinion has always believed, and believes now, that one legislature of a State has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the Constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made."

Since the decision of this Court in the case of *Washington University v. Rouse*, there have occurred certain changes, both in legal concept and in the situation of the parties to this alleged contract, which we deem pertinent to a decision of the instant case.

At the time the Legislature of Missouri granted an exemption from taxation to Eliot Seminary, it was the purpose of the Legislature to encourage this infant institution. This appears from the opinion of Judge Wagner in the Rowse case, in which he said, l. c. 326:

> "When the charter of the University was granted, the Legislature might have considered it reasonable to foster and encourage it in its infancy and confer upon it privileges and immunities while struggling into existence. But no provision is made in express terms, or by reasonable intendment, that those immunities should be perpetual and have the effect of withdrawing millions of subsequently acquired property from taxation."

This purpose of the Legislature has long since been served. The respondent, Washington University, has become a tremendously wealthy institution. The record in this case (R. 66 to 100) reveals the vast extent and value of its income-producing assets. Certainly, the respondent is capable of assuming its share of the tax burden along with other institutions of learning in this state which have not been favored with exemptions from taxation.

The power of taxation has, in recent years, at least, been regarded by this Court as the most fundamental power of a sovereign state. The alleged irrepealable surrender of this power should be carefully scrutinized by this Court in the light of recent judicial trends in this regard.

(A) It was beyond the power of the Legislature to grant a perpetual exemption from taxation.

There are certain powers inherent in sovereignty which have long been considered so essential that they cannot be surrendered by a legislative contract. The police power and the power of eminent domain are unquestionably of such a nature. It has long been held that the contract clause of the Federal Constitution may not be invoked to invalidate state laws enacted in the exercise of the police power or the power of eminent domain, notwithstanding an attempt by the State to abdicate such powers by an express grant.*

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*West River Bridge Co. v. Dix et al., 47 U. S. 507, l. c. 532:

"But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition."

Atlantic Coast Line Railroad Co. v. City of Goldsboro, 232 U. S. 548, l. c. 557:

"Conceding, for argument's sake only, the utmost that may be claimed as to the charters and property rights of plaintiff in error, we still have yielded nothing that may defeat the exercise of the police power by the State, or by its authorized agency."

And again, l. c. 558:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise." Citing cases.

That rights which are subject to state restriction cannot be put permanently beyond the power of the State by the making of a contract, was held by this Court in the case of *Hudson County Water Co.* v. *McCarter, Attorney General*, 209 U. S. 349, wherein the Court said (l. c. 357):

> "The defense under the Fourteenth Amendment is disposed of by what we have said. That under Article I, Section 10, needs but a few words more. One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter."

It is our earnest contention that the principle applied in the above cases to police power and to the power of eminent domain should, under every rule of logic, be applied to the protection of the people of the State from an abridgment of the power upon which the continued existence of the State depends—the power of taxation. The essential nature of this power has long been recognized by this Court and has recently been declared to be "the most basic power of government." *Wis.* v. *J. C. Penny Co.*, 311 U. S. 435, l. c. 444. It is inconsistent to hold that this most basic power of government may be irrevocably surrendered by a State Legislature while other powers which depend for their exercise upon the power of taxation may not be so surrendered. Without the power of taxation a sovereign state could not, of course, exercise the police and protective power and the power of eminent domain. Upon the power of taxation ultimately depends the exercise of all other powers and rights of a sovereign state. To hold, then, that the grant of tax exemption contained in the original charter of Eliot Sem-

inary constituted an irrevocable grant—an irrepealable contract, superior to the power of the State and to the will of the people of this State, is to hold that any one of the annual Legislatures of the State may contract away forever the State's most fundamental prerogative. It is to hold that a transient Legislature may destroy the foundation upon which an ordered society must depend. This thought was well expressed by Judge Wagner, of the Missouri Supreme Court, in the Rowse case, 42 Mo., l. c. 325:

> "It is incompetent, as before observed, for one legislature to attempt to derogate from the power or tie up the hands of a subsequent legislature. For an irrepealable contract of the character here presented, no authority or precedent is to be found."

This principle was vigorously concurred in by Mr. Justice Miller in his dissent in the Rouse case in this Court, wherein he stated, l. c. 443:

> "We do not believe that any legislative body, sitting under a state constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the state. This is a power which, in modern political societies is absolutely necessary to the continued existence of every such society. While under such forms of government the ancient chiefs or heads of the government might carry it on by revenues owned by them personally, and by the exaction of personal service from their subjects, no civilized government has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the state forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

The charter exemption upon which respondent relies contains no limitation upon the amount of property which may be withdrawn by the respondent from the tax rolls of the State and its municipalities. There is no limitation upon the duration of this exemption. Such an exemption is in derogation of the taxing power of the State—the most basic power of government—and should not, therefore, be protected under the contract clause of the Federal Constitution.

(B) The alleged "contract" upon which the respondent relies is subject to the reserved power of the sovereign State of Missouri to levy and collect taxes.

We have heretofore commented upon the fundamental nature of the power of taxation and have pointed out that it has been recognized as one of the powers essential to the maintenance of government. We, therefore, contend that the reservation of this vital power must be read into the alleged contract upon which the respondent relies. This Court has, in the case of *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, established the principle that:

> "• • • the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."

The attribute of sovereign power which was involved in the Blaisdell case was the right of the State to exercise its protective power as it relates to the economic welfare of the people of the State. This power was held to include the right to safeguard the economic interests of the State in a time of emergency. The emergency which confronted the State of Minnesota at the time of the enactment of the legislation involved in this case was held to "furnish the occasion" for the exercise of the power

reserved to the State to safeguard the vital interests of the people of the State. It is thus held by this Court that where the economic welfare of the people of a state is imperiled, legislation to remedy such a situation should be held valid even though it has the effect of impairing the obligation of a contract.

At the time the people of the State of Missouri adopted the State Constitution of 1865 with the provision repealing special tax exemptions, the State was confronted with an economic crisis of considerable magnitude. This condition was described by Judge Wagner in his opinion in the Rowse case, *supra*, in the following language, l. c. 326:

> "In 1853 taxes were light and the State debt was small, and exemptions could be made without great detriment. After that period the State embarked in a false and ruinous system of loaning its credit to corporations, by which it incurred an immense debt; then followed the Civil War, which increased its already burdensome obligations, and taxation became exceedingly onerous.
>
> "In this condition of things it was deemed the part of wisdom to make all property within the jurisdiction of the State, receiving the benefit of her laws and protection, contribute its proper proportion and share the common burdens. This was entirely a matter resting in the sound discretion of the legislative branch of the government, and we have been unable to find any objection to their exercise of the power."

The financial condition of the State resulted from certain infirmities in the Constitution of 1820. It was for the purpose of eliminating these infirmities that the Constitution of 1865 was adopted. At the time this Constitution was adopted, the evils resulting from the surrender of the taxing power by means of numerous special tax exemptions had become apparent. The people of the State,

in order to correct this condition, in effect declared in their Constitution that all such exemptions were void. These evils which were so painfully felt during the State's period of economic crisis were certainly subject to correction in the exercise of the reserved power of the State to safeguard the vital interests of the people. *Veix* v. *Sixth Ward Building & Loan Assn. of Newark*, 310 U. S. 32, 39. This case extends the doctrine of the Blaisdell case to legislation of a permanent nature designed to correct inherent weaknesses in the economic structure of the State.

Under the foregoing authorities, the constitutional provision repealing respondent's alleged tax exemption cannot be considered invalid on the ground of impairment of the "contract" of the respondent with the State.

(C) The "contract" of the respondent is not irrevocable and therefore is not protected by Section 10 of Article I of the Federal Constitution.

In addition to the reserved right of the State to safeguard the vital interests of the people of the State, which we have considered in part (B), *supra*, there are certain other features of the respondents alleged contract which make it subject to the control of the people of the State and the State Legislature.

The proposition that a contract which may by its terms be revoked by the State is not protected by Section 10 of Article I of the Constitution of the United States, is well established. This principle is tersely stated in the case of *Northern Central Ry. Co.* v. *Maryland*, 187 U. S. 258, 267, as follows:

> "In considering this question it will be borne in mind that it is elementary that where the constitution of a state reserves the right to repeal, alter or amend, all charters granted by the legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential

to bring them within the intendment of the clause of the Constitution of the United States protecting contracts from impairment. The cases supporting this doctrine are so numerous that they need not be cited."

At the time the charter containing the tax exemption was granted to Eliot Seminary, the Constitution of Missouri of 1820 was in effect. Section 2 of Article XIII of this Constitution provided:

"* * * That the people of this state have the inherent, sole and exclusive right of regulating the internal government and police power thereof and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness."

This constitutional provision must, of necessity, be considered as a term of the charter of Eliot Seminary which was granted while it was in effect. *Von Hoffman* v. *Quincy*, 4 Wall. 535, 550. Pursuant to this constitutional provision, the people of the State of Missouri in 1865 adopted a new Constitution by which all special exemptions from taxation were declared to be void. Thereafter the Legislature provided for the taxation of all property except that expressly exempt from taxation by the provisions of the Constitution of 1865.* The charter of Eliot Seminary was, we think, necessarily accepted by this institution subject to the reserved right of the people of the State of Missouri to change their Constitution, and it cannot therefore be said that the provision of the Con-

*Section XVI, Article XI of the Constitution of Missouri of 1865:
"No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations within this state."

stitution of 1865 above referred to has the effect of impairing a contract which was accepted subject to this reserved right.

In 1875 the people of the State of Missouri again adopted a new Constitution. Section 6 of Art. X thereof enumerates the classes of property that may be exempted from taxation. Section 7 of Art. X of this Constitution provides:

> "Sec. 7. Other exemptions void.—All laws exempting property from taxation, other than the property above enumerated, shall be void."

The respondent has conceded that the provisions of the Constitutions of 1865 and 1875, here in question, do, if valid, have the effect of repealing the respondent's tax exemption. It is not contended by the respondent that the property involved in this action is within the exemptions enumerated in either of these two Constitutions.

There was also in full force and effect at the time the charter here involved was granted to Eliot Seminary, a general law concerning corporations, Section 7 of which provided:

> "The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

The original charter of Eliot Seminary attempted to except the charter of this institution from the provision of the general law above set out. The exception in the charter was as follows:

> "* * * All property of said corporation shall be exempt from taxation and the sixth, seventh and

eighth sections of the first Article of the Act concerning corporations, approved March 19th, 1845, shall not apply to this corporation."

This attempt on the part of the Legislature to except the charter of Eliot Seminary from the general statute was commented upon by the Missouri Supreme Court in the Rowse case as follows, l. c. 325:

"No importance or weight can be attached to that provision of the charter of the defendant in error which excludes it from the operation of the seventh section of the general law in relation to corporations. It is incompetent, as before observed, for one Legislature to attempt to derogate from the power or tie up the hands of a subsequent Legislature. For an irrepealable contract of the character here presented no authority or precedent is to be found. Whilst the exemption continued, the property was free from taxation; but when the law was repealed, it then fell back in the general mass—liable, like all other property, for the burdens of government."

Therefore, by the law of the State of Missouri, the charter of Eliot Seminary was accepted subject to the reserved right of the Legislature to alter, suspend or repeal any of its provisions.

On February 12, 1857, the Legislature approved an act to amend the charter of Eliot Seminary. Section 1 of the amendatory act was as follows:

"Section 1. The name of the corporation known as 'The Eliot Seminary' shall henceforth be 'The Washington University,' by which name the said corporation shall have, hold and enjoy all the property, rights, franchises, endowments, immunities and privileges conferred upon and belonging to the Eliot Seminary."

This amendatory act by which the charter of Eliot Seminary purported to be transferred to the respondent was not excepted from the operation of Section 7 of the general act relating to corporations which was in effect at the time the amendatory act was passed. The amendatory act was therefore accepted by the respondent subject to the right of the Legislature to alter, suspend or repeal it in its discretion. *Hoge* v. *Railroad Company,* 99 U. S. 348, l. c. 354,* and *San Antonio Traction Company* v. *Altgelt,* 200 U. S. 304; *Planters' Insurance Company* v. *Tennessee,* 161 U. S. 193; *Memphis City Bank* v. *Tennessee,* 161 U. S. 186. It is our contention that the acceptance of the amendatory act of 1857 by the respondent rendered its charter subject to the provisions of the general law which were in effect at the time of this acceptance.

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*"If it be assumed, however, that by the act incorporating the Air Line Company it acquired not only the immunity from taxation which the Greenville and Columbia Company possessed, but also its original exemption from future legislative control, this exemption ceased when the company obtained an amendment to its charter in September, 1868, before its consolidation with the Georgia Company. By that amendment the charter of the company was at once brought under the control of the legislature by virtue of the act of 1841, the act granting the amendment containing no clause excepting the charter from the provisions of that act."

Conclusion.

We respectfully submit:

(1) That the Supreme Court of Missouri misconstrued the effect of the ruling in *Erie Railroad Company* v. *Tompkins* by denying its application or relevance to a case in which the contract clause of the Constitution is invoked, and erroneously concluded that this Court's decision in *Washington University* v. *Rouse* was "commandingly decisive" of the case at bar.

(2) That regardless of the views of this Court as to the better rule as to what constitutes a valid consideration to support a binding contract, this Court, in passing upon the question as to whether or not there is a contract, should accept the determination of the state Supreme Court as to the facts necessary to constitute a legal consideration essential to a binding contract.

(3) That regardless of the question of the applicability of the rule announced in *Erie Railroad Company* v. *Tompkins* to the case at bar, the decision of the Supreme Court of Missouri should be reversed, for the reason that the Missouri Supreme Court in its decision in the instant case felt bound to and did follow the majority opinion of this Court in *Washington University* v. *Rouse*, which majority opinion is unsound and should be overruled.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1941.

No. 711.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri, *Petitioners,*

vs.

THE WASHINGTON UNIVERSITY, *Respondent.*

On Writ of Certiorari to the Supreme Court of the State of Missouri.

PETITIONERS' REPLY BRIEF.

WILLIAM E. KEMP,
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THE WASHINGTON UNIVERSITY, *Respondent.*

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PETITIONERS' REPLY BRIEF.

ARGUMENT.

I.

Respondent challenges, without citation of authorities, petitioners' contention that this Court should determine the existence of the constituent elements of a contract in the light of the State law.

Under point I of our original brief, we asserted that the Missouri Supreme Court had erred in holding that, in determining whether the charter of the respondent con-

stituted a contract, the decision of this Court in the Rouse case was "commandingly decisive." It was and is our earnest contention that, since the decision in the case of *Erie Railroad* v. *Tompkins*, the existence of respondent's perpetual exemption from taxation and its validity as a contract should have been determined by the Missouri Supreme Court on the basis of the existence or non-existence of the essential elements of a contract as those elements are defined by the law of this State and not on the basis of the erroneous assumption that this Court's decision in the Rouse case was still controlling upon it.

In other words, the question presented was whether the Supreme Court of Missouri is still forced to follow this Court's decision under the Federal common law that a consideration may be presumed from the nature of the corporate charter, or whether the Missouri Supreme Court is free to decide on the basis of the law of the State that the charter tax exemption was not supported by a legal consideration and was at most a revocable grant, as was held by that court in its last independent opinion on the question in the Rowse case, in 42 Mo. 308.

In speaking of the ruling of the State court in the Rowse case, holding that the grant of respondent's charter was without consideration, respondent in its brief (p. 13) says:

> "This ruling constituted a marked and unjustifiable departure from the generally accepted principle that the charter of such a corporation as the respondent, accepted by the incorporators and acted on in good faith, is based on an adequate consideration and is therefore entitled to constitutional protection."

Respondent does not attempt to point out in what way or upon what principle this ruling of the State court "constituted a marked and unjustifiable departure from the

generally accepted principle," but blandly says that "petitioners' argument, if accepted, would leave this court powerless to correct the errors of a State court in this or any other situation. We submit that such is not, and cannot be, the law." No reason or authority is cited by respondent to support its assertion.

We said in our original brief (p. 10) that, since the Erie Railroad decision has repudiated the doctrine of a Federal common law, this court, in determining what constitutes the element of consideration, should apply the law as declared by the State court in the Rowse case.

Elaborating upon the argument in our original brief, we suggest the following illustrations as to the confusion incident to two distinct common law rules—State and Federal:

"A" undertakes to make a contract with "B" and the State court in determining, without regard to any subsequent legislation, the existence of a contract, finds that the transaction is not supported by a valid consideration and because of this lack of consideration "A" cannot recover. In a second case an attempted contract is entered into and thereafter a statute is passed, which, if there be a contract, the statute would impair it. The State court, applying the same rule as to the facts essential to make up consideration in the first illustration, holds that there is no contract and hence the constitutional provision against impairment may not be invoked. The Supreme Court of the United States, ignoring the rule of the State court as to what constitutes consideration, holds in the second case that there is a contract and that this legislation impairs it. Thus we have the confusion incident to two rules of common law, State and Federal.

This Court has uniformly held that the provision of Section 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is

directed only against impairment by subsequently enacted legislation, and not by any change in judicial decisions. *Morton* v. *Dardanelle Sp. School Dist.*, 121 F. (2d) 423, l. c. 424; *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, l. c. 451 (opinion by Taft, C. J.), and in the case of *People's Banking Co.* v. *Sterling*, 300 U. S. 175, at l. c. 182, the Court said:

> "We cannot see in this an attempt to lay upon the stockholders by force of later legislation a new and different burden than that accepted at the outset. Nor would it help the appellants anything to assume in their behalf that the Constitution of the State has been given a new meaning, *if the new meaning is not due to the compulsion of a statute*. Change by judicial construction of antecedent legislation does not impair a contract, at least in the forbidden sense, if it be granted *arguendo* that such a change can be discovered."

The effect of these cases is to say that where a State court, in deciding that no contract existed, or that no impairment had taken place, did not give effect to a statute passed subsequently to the making of the contract, then the constitutional provision against the impairment of the contract may not be invoked. In such a case, the United States Supreme Court will not disturb the decision of the State court as to the nonexistence of a contract. But where legislation enacted subsequent to the alleged contract is involved, this Court may, in the absence of the rule in the Erie case, disregard the State court's determination as to what constitutes any essential element of a contract, thus contributing to the confusion which the Erie decision sought to relieve.

II.

The question of *res judicata* is not before this Court for decision.

Even though the Supreme Court of Missouri expressly refused to pass upon the question of *res judicata* because it was not before the Court, respondent makes the contention that this Court should affirm the judgment on that ground (respondent's brief, pp. 17-20).

In holding that it could not pass upon the question of *res judicata* because it was before it, the Missouri Supreme Court in its opinion (153 S. W. [2d] 35, 39) said:

> "The university pleaded and proved two grounds for relief. First, its charter exemption, and second, the doctrine of *res judicata*. The decree of the trial court in favor of the university was based exclusively on the ground that the charter of the university exempted it from texation. There is no mention, naturally, of *res judicata* in appellants' motion for new trial, nor did the university appeal from the decree because of the court's failure to rule on this contention. While we find the university's plea of *res judicata* is upheld by the decisions in *Kansas City Exposition Driving Park* v. *Kansas City*, 174 Mo. 425, 74 S. W. 979, and *North St. Louis Gymnastic Society* v. *James Hagerman, Jr.*, 232 Mo. 693, 135 S. W. 42, we can not pass upon it because it is not before us."

Manifestly, this Court will not give consideration to respondent's insistence that the judgment of the State court be affirmed on a ground that was not before that Court for decision. It is the settled practice of this Court, in certiorari cases from State courts, to consider only questions which were presented or decided in the State court. This Court, in its recent decision in *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430,

434*, declined respondent's suggestion that it consider an additional ground in support of the judgment. That case was before this Court upon certiorari to review the judgment of the Court of Appeals of New York, which had affirmed the judgment of the lower court, holding that the New York City tax upon sales of fuel oil was unconstitutional. The affirmance was on the single ground that the tax violated the "commerce clause," and the respondent in this Court on certiorari unsuccessfully attempted to have this Court consider as an additional reason in support of the judgment of the State court that the tax was unconstitutional by reason of being a prohibited impost or duty on imports and exports.

The Missouri Supreme Court, not only in its opinion in the case at bar, but also in the Baumann case, 341 Mo. 708, 726, held that the question of *res judicata* was not brought before it for its decision. The State court having

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*Mr. Justice Stone delivering the opinion of this Court, in refusing to consider such additional ground, said:

"In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. *Dewey* v. *Des Moines*, 173 U. S. 193; *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633; *Whitney* v. *California*, 274 U. S. 357, 362, 363; *New York ex rel. Cobn* v. *Graves*, 300 U. S. 308, 317.

"Like considerations, we think, require us to refuse to entertain such new grounds of attack as a support for a state judgment of invalidity based on an erroneous construction of the Constitution. In the exercise of our appellate jurisdiction to review the action of state courts we should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented. Similarly their erroneous judgments of unconstitutionality should not be affirmed here on constitutional grounds which suitors have failed to urge before them, or which, in the course of proceedings there, have been abandoned."

To the same effect see—*Voeller* v. *Neilston Co.*, 311 U. S. 531, 535.

Grayson v. *Harris*, 267 U. S. 352, 358.

Pagel v. *McLean*, 283 U. S. 266, 269.

twice passed upon a question involving its own practice, and twice held that *res judicata* was not before it upon the record, this Court, under its well established practice, must refuse respondent's suggestion that the question of *res judicata* is in the case here.

III.

Respondent's claimed legislative grant of an all-inclusive and perpetual tax exemption is not inviolable.

Under point 3 of respondent's brief (p. 21 *et seq.*), respondent urges that its claimed perpetual and all-inclusive tax exemption should be declared inviolable and advances three considerations to support the validity of the tax exemption clause in its charter:

(1) There was no constitutional restraint against the granting of the exemption;

(2) The exemption clause is unambiguous and embraces the types of property involved;

(3) There is no showing of abuse of legislative power in the original grant or of the existence of any present emergency which might justify relaxation of a constitutional guaranty.

As to the first of respondent's stated considerations, if it is true, as petitioner contends, that the sovereign power of taxation can never be perpetually alienated by a transient legislature, then it is immaterial whether or not at the time of the attempted grant there was any express constitutional restraint against the granting of the exemption. Further, if, as contended in our original brief (p. 19 *et seq.*), the grant was subject to the reserved sovereign power of the state to tax, then such conditional grant was revoked by the people of the State of Missouri in the adoption of their Constitutions of 1865 and 1875,

and their legislative enactments pursuant thereto as referred to later herein.

In further support of our contention that it was beyond the power of the legislature to grant perpetual exemption from taxation, we call attention to the following additional decisions:

In *North Pacific Railroad* v. *Duluth*, 208 U. S. 583, l. c. 596, this Court sustained an ordinance of the City of Duluth requiring a railway company to repair, at its expense, a viaduct over numerous tracks at a street intersection, which ordinance was in conflict with the provisions of an earlier contract providing for the cost of construction of said viaduct. In passing on this question, the Court said, l. c. 596:

> "There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts."

And in support of this position, the Court quoted from its earlier decision in *Railway Company* v. *Bristol*, 151 U. S. 556, l. c. 576, to the following effect:

> "The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

Summarizing its views in the North Pacific Railway case, the Court held that:

> "the result of these cases is to establish the doctrine of this Court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution."

In *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20 (opinion by Chief Justice White), the Court had under consideration an attempt by the City of Philadelphia to exercise the right of eminent domain by opening a street to the hospital property in the face of a state statute specifically forbidding the opening of any street or alley through the grounds in question without the consent of the hospital authorities. It was there held, l. c. 23:

> "There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the States cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties."

As to respondent's second consideration that the exemption clause is unambiguous and embraces the types of property involved in the instant suit, respondent asserts that the scope of the exemption is no longer open for consideration. In neither of the two decisions which respondent cites as authority for the proposition that its

charter exempts *all* of its property from taxation, was the point presented to or considered by the Court concerning the application of the tax exemption clause to property acquired after the adoption of the Constitutions of 1865 and 1875. In considering the types of property exempt, the Courts in those cases had under consideration only the question of the exempting clause being limited to property actually occupied and directly used for university purposes. No consideration was given to or determination made concerning the question of exemption of after-acquired property. The instant suit involves the right of the City of Kansas City to levy and collect taxes on three tracts of real estate within Kansas City, purchased by the University between 1892 and 1937, and held for investment purposes (R. 116-117).

Respondent's brief makes no attempt to answer the contention made in our original brief (p. 26), that the property involved in this suit is subject to taxation by Kansas City by virtue of the Missouri Constitutions of 1865 and 1875 and the legislative tax acts passed pursuant thereto, which were adopted and enacted long prior to the time of the acquisition by respondent of the property involved in the instant case. No rights in the property involved herein had vested in the respondent prior to the adoption of said new Constitutions, both of which expressly prohibited special tax exemptions. Particularly did the framers of the Constitution of 1875 determine that the exemption from taxation of the property of educational institutions should be limited to the extent of one acre and the buildings thereon when used exclusively for school purposes. This determination resulted from the acquisition by private educational institutions, allegedly protected by character tax exemptions, of vast amounts of income producing real estate. While the question of

subsequently acquired property was not squarely before the Missouri Supreme Court in the case of William Jewell College, 234 Mo. 299, cited by respondent, the language of Justice Brown, in his concurring opinion, which separate opinion was concurred in by Justice Woodson, is significant. At page 323, Justice Brown says:

> "If this suit involved an attempt to collect taxes from real estate acquired by defendant after the adoption of the Constitution of 1875, a very different question would be presented, but one upon which it is not now necessary to express an opinion."

Since respondent in its brief (p. 26) quotes from the opinion of Judge Graves in the William Jewell College case, referring to it as "a significant utterance of the very court whose judgment is hereunder attacked," we feel it appropriate to call attention to the fact that the opinion of the Justice from which the quotation is taken was concurred in unqualifiedly by only one other judge of the Missouri court, two judges concurring in result only by separate opinions, and three of the seven judges dissenting. Therefore, the language quoted by respondent can, under such circumstances, scarcely be said to represent the "utterance of the very court whose judgment is hereunder attacked." It has uniformly been held in this State that, under such circumstances, the views expressed are merely the views of the judge who wrote the opinion and the judges who specifically concurred therein, where less than a majority of the judges so concur, and hence the quoted language from the Graves opinion cannot be said to be "the utterance of the court." *Gary Realty Co.* v. *Swinney*, 322 Mo. 450, l. c. 458.

Under the third consideration advanced in support of the validity of the tax exemption, respondent recognizes

that "the power of a legislature to bind succeeding legislatures * * * is not without limit" and that there may be situations that would justify "a relaxation of constitutional guarantees" (respondent's brief, p. 26), but denies that the case at bar presents any features justifying an application of these conceded principles. It is petitioner's contention that the factual situation recited by Justice Wagner in the Rowse case presents an adequate justification for the public policy as to taxation as solemnly declared by the people in the adoption of the Constitution of 1865 and again in the adoption of the Constitution of 1875. In adopting those constitutional provisions, the people of the State exercised the right which they had expressly reserved to themselves in the Constitution of 1820 which, in Section 2 of Article XIII thereof, provided that the people of this State have the "inherent, sole and exclusive right of regulating the internal government and police power thereof and of altering and abolishing their constitution and form of government whenever it may be necessary to their safety and happiness." The exercise of a right which was a condition of the so-called contract cannot be said to be an impairment of that contract. *Northern Central Railway Co.* v. *Maryland*, 187 U. S. 258, l. c. 267. Petitioners further urge that, based upon the law of Missouri as to the facts necessary to constitute a legal consideration—which we submit is a sounder view than that announced by this Court in the Rouse case—no question of any "relaxation of constitutional guaranties" are here involved.

The authorities relied upon by respondent to support its contention on this point were all decided during the period of the erroneous assumption of the existence of a Federal common law. One of the two cases which respondent cites as outstanding cases upholding validity of tax

exemption clauses in charters of charitable and educational institutions, is the case of *University* v. *People*, 99 U. S. 309, involving Northwestern University (respondent's brief, p. 24). The doctrine of this case was greatly relaxed in the later case of *Chicago Theological Seminary* v. *Illinois*, 188 U. S. 662, 674. This decision is indicative of the later tendency to give great deference to the State court's interpretation of the language of a charter involving tax exemption.

Respondent advances the argument that the tax exemption was in the nature of an annual appropriation of public funds in aid of the enterprise and constituted a contribution by the State to respondent.

It is true that the State was then, and is now, vitally interested in the promotion of education, but the suggested method of state support of education is in conflict with the public policy solemnly declared by the people by the Constitutions of 1865 and 1875. The State supports public education out of funds of the state treasury, raised by state-wide general taxation. The suggested appropriation of public funds as a contribution by means of exempting its property from taxation results in unequal distribution of the burden of supporting respondent University and discriminates against the local communities in which it may hold vast tax exempt income properties. And thus, Kansas City and St. Louis, where respondent's real estate investments are concentrated, are unequally burdened with the support of respondent University, and, on the theory of State support through tax exemption, are unjustly discriminated against. Should the University choose to concentrate its investment in the real estate of *any* particular city of the State, sufficient property might well be removed from the tax rolls as to imperil the necessary revenues for the proper maintenance of essential services in such city.

Respondent reiterates with much eloquence that tax exemption itself is an act of sovereignty, but cites no authority in support thereof. Such argument is not convincing since if the granting of the tax exemption be the exercise of a power of sovereignty, then, likewise, a contract to relinquish the right of eminent domain or of the police power would be an act of sovereignty rather than the relinquishment of sovereignty. It is well settled, and respondent concedes, that the sovereign cannot alienate from itself the police powers or right of eminent domain. If the bargaining away of the police power and eminent domain are acts of sovereignty, then, on respondent's theory, why should not such exercise of sovereignty be held valid?

When the special Act of 1853 incorporating the Eliot Seminary was amended by the special Act of 1857, not only was the name of the corporation changed to "The Washington University," but, as pointed out in respondent's brief (p. 25), the original act was amended to change the powers of the corporation in many other respects. Section 2 of the Amendatory Act prohibited instruction "either sectarian in religion or party in politics." Section 5 undertook to relinquish the sovereign right to eminent domain by providing:

> "And it shall not be lawful for the City of St. Louis or the County of St. Louis to open any road, street, alley or avenue through or over said tract or any part thereof so long as it shall remain the property of said corporation, without the consent of the Board of Directors of said university, expressed by resolution formally entered upon the minutes of their proceedings." (R. 109.)

Would respondent urge that its attempted charter exemption from the exercise of the right of eminent do-

main was a valid and enforceable contract? Is not the sovereign power of taxation more vital and necessary to the functioning of an ordered society than that of the exercise of eminent domain? If the latter cannot be bargained away, on what principle or distinction can the former be the subject of a perpetual grant? Sovereign powers should not include the right of self-destruction by granting perpetual tax exemption to an unlimited amount of property.

Respondent says (p. 27) that the real question is not whether the State can bargain away its sovereign power, but whether the particular bargain satisfies our concepts of an enforceable contract. We assert that the first proposition is involved in the determination of the second. Our concepts of an enforceable contract impel us to conclude that respondent's claimed tax exemption is not such a contract, first, because as determined by the Missouri court in the Rowse case, the element of consideration is lacking, and second, because the State cannot contract away forever the most fundamental of the attributes of sovereignty. The question may be considered, as asserted by respondent, whether the particular bargain—the University's charter exemption—satisfies the concepts of this Court concerning a contract which shall stand as long as ordered society shall exist under our present form of government. In other words, is not the Federal Constitution, including the contract clause thereof, a live and virile law which may be subject to growth and change in the Court's concept of its purpose and function in an ordered but changing society? Rather, will not this Court, in satisfying its concept of a perpetual tax exemption as a contract on the one hand, and its concept of the right of future citizens of Missouri yet unborn to have a free exercise of the powers of sovereignty, give its sanction to the latter?

IV.

It is at least doubtful whether the amendatory charter of Washington University carried over and transferred any exemption from taxation.

The amendatory charter of the Washington University provided:

> "The Washington University * * * shall have, hold and enjoy all the property rights, franchises, endowments, immunities and privileges conferred upon and belonging to the Eliot Seminary."

This language is not broad enough to confer exemption from taxation.

In the case of *Chesapeake and Ohio Rwy. Co.* v. *Miller*, 114 U. S. 176, a charter by the State to the Covington Railroad Co. provided that:

> "No taxation upon the property of said company shall be imposed by the state until the profits of said company shall amount to 10% of the capital."

A successor corporation to the original grantee, which acquired its property under a foreclosure sale by virtue of a statute governing foreclosures, succeeded to, among other things, "all such franchises, rights and privileges as would have been had by the first company but for such (foreclosure) sale."

It was contended by the successor railway company that it inherited exemption from taxation by virtue of the charter originally granted to its predecessor and the language of the statute immediately above quoted. The Supreme Court held that said language, broad as it was, was not sufficient to give it this force and meaning; that there was no express reference to a grant of any exemp-

ion or immunity; that nothing was said in relation to the subject of taxation; that the words actually used do not necessarily embrace a grant of such exemption from taxation, l. c. 185.

The only difference between the language in the amendatory charter of the Washington University and the language above quoted is that the amendatory charter uses the word "immunity," while the statute above referred to does not. However, the statute uses words that would seem to include immunities, to-wit: "franchises, rights and privileges."

It should be noted that the Court said that nothing was stated in the statute in relation to exemption from taxation, and that, therefore, they did not necessarily embrace such an exemption. The same may be said of the language in the amendatory charter of the Washington University.

V.

The amended charter of Washington University, enacted by the Legislature and accepted by the University in 1857, contains no express language exempting that charter from the provisions of Section 7 of the Law of 1845, reserving the right of "alteration, suspension and repeal in the discretion of the Legislature" of any charter granted by it, and hence is subject to the constitutional provisions of 1865 and of 1875 and the taxing acts enacted by the Legislature pursuant thereto.

This position is asserted under point C of II, at page 24 of the original briet. Although respondent, in its brief, has failed to make any answer to this contention, we wish to somewhat amplify what we there said.

The right reserved by Section 7 of the Act of 1845, to the effect that "The charter of every corporation granted by the Legislature shall be subject to alteration, sus-

pension and repeal," was applicable to the amended charter. The original charter undertook to do two (2) things: (1) to exempt the property of the corporation from taxation, and (2) to make that exemption irrevocable by expressly exempting it from the provisions of Section 7 quoted above.

Even if the amendatory act carried over and transferred to Washington University "all the property, rights, franchises, endowments, immunities and privileges conferred upon and belonging to the Eliot Seminary," nowhere is there any express intention in the amendatory act to continue or carry over the exemption from the provisions of Section 7 above. Applying the rule of strict construction indulged in all cases involving immunities from taxation, we submit that the provision against the application of the law reserving the right to amend charters cannot be read into the amended charter, and hence this amended charter, which is the charter under which Washington University today holds its property, was accepted subject to the reserved power of the State to alter and amend any special charter enacted by the Legislature.

The Baumann case, while ruling on the question of the transfer of the immunities and privileges conferred on the Eliot Seminary as including the tax exemption, did not discuss or pass upon the question of the amended charter being subject to Section 7 or the right of alteration, amendment and repeal as reserved in Section 7, the Court there holding that regardless of whether it be considered a transfer of corporation privileges or whether the rights to exemption from taxation be considered a franchise, "it was at least an immunity, the continued enjoyment of which was vouchsafed by the act." Even if this be conceded, *arguendo*, and that such tax immunity

was transferred, the corporation was entitled to enjoy the same only until the State so exercised its reserved right to alter and amend the charter under Section 7.

In the Kentucky Bank tax cases, this Court applied the rule that if there is nothing in the amending or extending act expressing the plain intent of the Legislature that the charter, as amended or extended, should not be subject to the reserved power of the Legislature to amend or repeal, then the extended or amended charter is subject to amendment or repeal. *Louisville* v. *Bank of Louisville*, 174 U. S. 439, and *Citizens Savings Bank of Owensboro* v. *Owensboro*, 173 U. S. 636.

Irving Trust Co. et al. v. *Day*, 62 S. Ct. 398, 86 L. Ed. 349, recently decided by this Court, and cited in respondent's brief (p. 12), gives application to this rule. In delivering this recent opinion of this Court, Mr. Justice Jackson said, l. c. 401-402:

> "McGlone was free to consent to a cancellation or revocation of Helena's waiver, or to make a valid bequest to her of all or any of his property despite it. Further, he could free her of the restraints of her waiver by voluntarily committing an act to which the applicable law attached that consequence. This is what he did by executing the codicil of July 6, 1934, voluntarily taking advantage of the privilege of further testamentary disposition offered by the laws of New York. So long as McGlone stood on the will made before the effective date of the legislation, the law allowed him to avail himself of the full force and effect of the waiver. Given his choice between adhering to any will made before September 1, 1930, or of bringing his estate under the new law, McGlone saw fit to execute a further testamentary document after that date and thus to bring the new legislation into operation as to himself, his estate and survivors. For the purpose of considering the application of the contract and due process clauses of the Federal

Constitution, the case is as if he had made a volu
tary legacy to his wife despite her waiver. If th
obligation of the waiver suffered impairment, it wa
only because he exercised further testamentary priv
ileges with a condition attached, and thereby brough
those consequences unwittingly or intentionally upo
himself and his estate."

Merely to indicate the current trend of judicial thinking, we call this Court's attention to the decision of the Minnesota Supreme Court in the case o Trustees of Pillsbury Academy v. State, 204 Minn. 5 283 N.W. 727, l.c. 732, wherein the Court said:

"The time may be ripe to re-open and re-consi the question whether a state's power of taxation any more than that of police or eminent domain, may be bartered away, substantially limited, or impaired by act of its own legislature. It is settled that the police power and that of eminen domain may not be so trammeled for all time. Wi important limitations, the rule is established that the power of taxation, just as much and as vitally an attribute of sovereignty, may be subject to contract limitation. That view has alwa met with strong and persuasive resistance. Alwa it has been questioned by eminent authority, and upon reason not easily demolished. We do not dis cuss the problem further because it has not been argued. We do not consider it forever closed. See note, 'Corporate taxation in the United Stat as affected by the contract clause in the Federa Constitution', 60 L.R.A. 33."

In this connection, we wish to call particular a tention to said note in 60 L.R.A. at pp. 60-64 whic contains a summary of the decisions in the Ohio Ban cases involving legislative power to surrender beyo recall any part of the sovereign power of taxation, and pp. 69-74 of said note summarizing the decision on the reserved right to alter, amend and repeal,

the Missouri Supreme Court in its decision in the instant case felt bound to and did follow the majority opinion of this Court in *Washington University* v. *Rouse*, which majority opinion is unsound and should be overruled.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 711.

H. J. GORMAN, CITY TREASURER OF KANSAS CITY, MISSOURI, AND FRANK McCABE, CITY ASSESSOR OF KANSAS CITY, MISSOURI,
PETITIONERS,

VS.

THE WASHINGTON UNIVERSITY, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

R. B. CALDWELL,
RICHARD S. BULL,
H. M. NOBLE,
JOHN W. OLIVER,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 711.

H. J. GORMAN, CITY TREASURER OF KANSAS CITY, MISSOURI, AND FRANK McCABE, CITY ASSESSOR OF KANSAS CITY, MISSOURI, PETITIONERS,

VS.

THE WASHINGTON UNIVERSITY, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioners seek a Writ of Certiorari to review a judgment of the Supreme Court of Missouri affirming a decree of the Circuit Court of Jackson County, Missouri, that permanently enjoined petitioners in their official capacity as taxing officials of the State of Missouri from collecting or attempting to collect any taxes on property owned by Respondent in Kansas City, Missouri, for the reason that said property is exempt from taxation by virtue of a legislative contract with the State of Missouri.

The Petition for Writ of Certiorari states none of the reasons which, under Rule XXXVIII of this Court, is a ground for the issuance of the writ.

FACTS.

Beginning shortly after 1931 the taxing authorities of both St. Louis, Missouri, and Kansas City, Missouri, began to attempt to exercise the state power of taxation delegated to them by the State of Missouri against property owned by the Respondent. This attempt was in the face of the legislative contract granted Respondent by the State of Missouri in 1853 by a Charter that provided that "all property of said corporation shall be exempt from taxation," and in the face of the decision of this Court holding that any attempt to tax Respondent was a violation of Section 10 of Article I of the Constitution of the United States which provides that no state shall pass any law impairing the obligations of the contracts. *The Washington University* v. *Rouse*, 8 Wall. 439 (hereinafter sometimes referred to as the *Rouse Case*).

Respondent filed suits for injunctions against the taxing authorities of St. Louis and Kansas City, respectively. The St. Louis case was tried first during the February Term of the Circuit Court of the City of St. Louis (R. 27) and a permanent injunction was granted. That case was appealed to the Supreme Court of Missouri and that court *en banc* in an elaborate opinion unanimously affirmed the decree of the trial court. That case was decided July 30, 1937, and is reported as *The Washington University* v. *Baumann*, 341 Mo. 708, 108 S. W. 2d 403 (R. 28) (hereinafter sometimes referred to as the *Baumann Case*).

In the Kansas City case Respondent obtained a temporary injunction against the Petitioners on November 30, 1934. The action pending at Kansas City which is involved in the case at bar lay dormant pending the disposition of the appeal to the Supreme Court of Missouri

in the St. Louis case. The Kansas City case was finally tried on the merits after the Supreme Court of Missouri had decided the St. Louis case and Respondent's temporary injunction was made permanent on January 26, 1940 (R. 2). This case was also appealed to the Supreme Court of Missouri and the arguments now urged in support of the petition for certiorari were then urged to that court. The Supreme Court of Missouri unanimously affirmed the decree of the trial court. *The Washington University v. Gorman et al.*, (R. 172) (Reported unofficially 153 S. W. 2d 35).

The theory upon which the *Baumann Case* was tried in St. Louis and the theory upon which the case at bar was tried in Kansas City were substantially identical (R. 25) and the testimony which was introduced in the *Baumann Case* also served as the testimony upon which the case at bar was decided (R. 68), with the exception that in the St. Louis case the bulk of the property owned by Respondent, consisting of some sixty or more pieces of property, was involved (R. 108), whereas in the case at bar only three pieces of property are in controversy (R. 10).

No question is presented about the use of the property involved in the case at bar because it was admitted that all of the net revenues derived from the three properties involved enter the general expense fund of the Respondent and are devoted to the educational purposes of the University (R. 67). The evidence showed that the Respondent operates on a very close budget, and that the deficit or surplus (which is never accumulated but carried over as income for the succeeding year) is always around two or three thousand dollars (R. 79). Since its incorporation by state charter in 1853, Respondent has risen to be one of the educational beacons of the Middle West and is internationally famous for the excellence of its School of Medicine. The Supreme Court of Missouri acknowl-

edged that often in the past states had abused their power of granting charters, but held in the case at bar that "in this instance, however, it cannot be said the grant was improvident" and gave sound reasons for so holding (R. 178).

In both the *Baumann Case* and the case at bar Respondent proceeded upon the theory that by its action in carrying out the purpose of its incorporation and acceptance of the state charter a valid contract was consummated between it and the State of Missouri and that the laws under which the taxing authorities were attempting to tax were null and void (in so far as such laws purport to impair its contractual right to tax exemption) because they were contrary to and in violation of the contract clause of the Constitution of the United States. (Respondent in the case at bar further pleaded that Petitioners were bound by the decision of this Court in the *Rouse Case, supra,* and in the *Baumann Case, supra.* The Supreme Court of Missouri acknowledged that the plea of *res judicata* is upheld by the Missouri cases but that it could not rule specifically on the point in the case at bar because the matter procedurally was not before it (R. 179).)

In both of the cases decided by the Supreme Court of Missouri the language supporting Respondent's contention is clear and positive. It was there held:

> "The University has a contractual charter with the state, and that contract under the decision of the United States Supreme Court in the Washington University Case cannot be impaired by subsequent legislation. It stands superior not only to our present taxing law but even to our Constitution insofar as they purport to destroy the University privileges and immunities thereunder, relied on for years by it and at least some of its benefactors, as the evidence shows. To do so would be to commit fraud" (See 341 Mo. 708, 108 S. W. 2d 412, and R. 178).

SUMMARY OF ARGUMENT.

I.

No Question Concerning Erie R. Co. v. Tompkins, 304 U. S. 64, Is Involved in the Case at Bar.

Petitioners' basic contention erroneously assumes that this Court, in deciding that any attempt to tax Respondent would be a violation of the contract clause of the Federal Constitution in *The Washington University* v. *Rouse*, 8 Wall. 439, predicated its decision on the doctrine of *Swift* v. *Tyson*, 16 Pet. 1. Progressing from this erroneous assumption, Petitioners advance a faulty minor premise that *Erie R. Co.* v. *Tompkins*, in overruling *Swift* v. *Tyson*, actually decided that this Court is now required to follow the decision of a state court on the federal question of whether the contract clause of the Constitution is violated.

Petitioner then erroneously contends that the true effect of *Erie R. Co.* v. *Tompkins*, when applied to the litigation at bar requires this Court to retroactively cancel its decision in *The Washington University* v. *Rouse Case*, thus *pro tanto* leaving the decision of the Supreme Court of Missouri which the *Rouse Case* reversed outstanding. Petitioners erroneously conclude that the reversed state decision holding no violation of the Federal Constitution by state action must, under their unique construction of *Erie R. Co.* v. *Tompkins*, be followed by and is controlling upon this Court. By this process ratiocination the Petitioners seek the right to tax Respondent although this Court has held and the Supreme Court of Missouri has held twice since the decision of this Court, that Respondent is exempt from taxation.

The error in Petitioners' argument is that the doctrine of *Swift* v. *Tyson* was in no way involved, not relied upon nor even cited in the *Rouse Case*. In fact the *Rouse Case* relied upon cases decided by this Court before *Swift* v. *Tyson* was even decided.

The *Rouse Case* involved the federal question of whether the State of Missouri had violated its contract with Respondent. In determining this question this Court decides for itself whether there is a contract, what its obligations are, and whether the action taken by one of the parties violates the federal Constitutional prohibitions.

Swift v. *Tyson* and *Erie R. Co.* v. *Tompkins* specifically excepted all federal questions from their purview and dealt solely with the question of whether Section 34 of the Judiciary Act of 1789, which also excepted all federal questions, required federal trial courts to recognize the decisions of state courts as "laws" within the meaning of that section. The argument concerning *Erie R. Co.* v. *Tompkins* was presented to the Supreme Court of Missouri in the case at bar and we adopt its language of disposition:

> "In this situation it would be absurd to say that the United States Supreme Court is bound by the decision of this Court when that very decision is under review on appeal" (R. 177).

II.

There Is No Valid Reason Requiring This Court to Re-examine the Case of The Washington University v. Rouse, 8 Wall. 439.

The reasons assigned for a re-examination are not sufficient to warrant such action because they are predicated upon the erroneous assumption that this Court, by

Erie R. Co. v. *Tompkins*, altered some rule that affects the case at bar.

Under the decisions of this Court great weight and marked influence is given to the decisions of a state court regarding questions of tax exemptions and the construction of the same in light of the contract clause of the Federal Constitution. The Supreme Court of Missouri in two cases, one decided in 1937 and in the case at bar decided in 1941, has decided adversely to Petitioners all of the questions they now raise. It would serve no useful purpose to continue this useless litigation.

III.

The Case of Trustees of Phillips Exeter Academy v. Exeter, 90 N. H. 472 (Unofficially Reported 11 Atl. 2d 569), Does Not Support Petitioners' Contention.

The language quoted from the *Phillips Exeter Academy Case* appeared only in the unofficial report of that case printed in the Atlantic Reporter. After counsel for the Academy had filed a motion for re-hearing pointing out the fundamental error in the opinion concerning the effect of *Erie R. Co.* v. *Tompkins*, the Supreme Court of New Hampsire revised its opinion on this question and completely altered the language and the meaning of that portion of the opinion quoted and relied upon by Petitioners. That case is now in accord with the decisions of this Court and with the decision in the case at bar. There is, therefore, no confusion.

ARGUMENT.

POINT ONE.

No Question Concerning Erie R. Co. v. Tompkins, 304 U. S. 64, Is Involved in the Case at Bar.

The Washington University v. *Rouse*, 8 Wall. 439, and *Home of the Friendless* v. *Rouse*, 8 Wall. 430, were companion cases. The appeals to this Court from the Supreme Court of Missouri were pursuant to Section 25 of the Judiciary Act of 1789 on the ground that the decision of the state court in each case was against a right claimed under the Federal Constitution by appellant. The state decisions appealed from are reported in 42 Mo. 308 and 42 Mo. 361, respectively.

In the *Rouse Case* this Court held that "there are no material points of difference between the case of *Home of the Friendless* v. *Rouse, Collector*, just decided, and this case, and the views presented in that case are applicable to this." In the *Home of the Friendless Case* this Court had held:

> "The important question raised by the record is: whether the State of Missouri contracted with the plaintiff in error not to attack its property."

After discussing the facts this Court held that:

> "This charter is a contract between the State of Missouri and the corporation that the property given for the charitable uses specified in it shall, so long as it is applied to these uses, be exempted from taxation. It follows that any attempt to tax it impairs the obligation of the contract. * * *
>
> "Without pursuing the subject further we are of the opinion that the State of Missouri did make a

contract on sufficient consideration * * * to exempt the property of the corporation from taxation, and that the attempt made on behalf of the state through its authorized agent, * * * is an indirect mode of impairing the obligation of the contract, and cannot be allowed.

"The judgment of the Supreme Court of Missouri reversed and the cause remanded to that court below with directions to proceed in conformity with this opinion."

This Court in the *Rouse Case* compared the charter granted Respondent to the charter granted the Home of the Friendless and held:

"* * * We find the existence of the same contract of permanent exemption from taxation as in the charter of the Home of the Friendless * * *. The public purposes to be attained in each case constituted the consideration on which the contracts were based * * * the charter of the University * * * having been accepted, and the corporation, since its acceptance, having been actively employed in the specific purpose for which it was created, the exemption from taxation became one of the franchises of the corporation of which it could not be deprived by any species of state legislation."

Basic Contention of Petitioners.

Petitioners repeatedly assert that the opinion of this Court in the *Rouse Case* was premised upon and controlled by the doctrine of *Swift* v. *Tyson* (See Petition 5, 7, 9, 16). Arguing from this false premise, Petitioners project a theory that because *Erie R. Co. v. Tompkins* overruled *Swift* v. *Tyson* the basis of the decision in the *Rouse Case* is therefore undermined.

Error in Petitioners' Basic Contention.

This Court in deciding *The Washington University* v. *Rouse* in no manner relied upon the doctrine of *Swift*

v. *Tyson*. It relied principally upon cases decided long before *Swift* v. *Tyson* was ever decided. In fact the leading cases relied upon by this Court in the *Rouse Case* were decided at a time when the rule concerning Section 34 of the Judiciary Act was in accord with the interpretation of that Act recently announced by *Erie R. Co.* v. *Tompkins.**

Section 34 of the Judiciary Act of 1789 dealt and now deals with what rule of decision of a federal trial court sitting in a particular state shall follow. Its very terms excepts cases "where the Constitution, treaties or statutes of the United States" are involved. Like exception is made in the decision of this Court in *Erie R. Co.* v. *Tompkins*. This Court clearly stated that "*except in matters governed by the federal Constitution,* or by Acts of Congress, the law to be applied in any case is the law of the state" (304 U. S. 178).

Erie R. Co. v. *Tompkins* did not alter the rule of this Court insofar as the applicability of Section 34 is concerned

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*See Warren "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv. L. Rev. 49, at 84, where it is stated: "Until Judge Story, in 1842, decided that the word 'laws' in this section did not include the 'common law' of the state, * * * it had never been held that there was ever any doubt about the matter." See also cases cited in note 85 on page 88.

See also Jackson, "The Rise and Fall of *Swift* v. *Tyson*," 24 A. B. A. J. 609, at 610, where it is stated: "But prior to 1842, when *Swift* v. *Tyson* was decided, this consideration (of promotion of uniformity of decision) did not seem to be of controlling weight * * * in the face of these expressions, the expansive doctrine of *Swift* v. *Tyson* seems almost inexplicable."

See further the annotation in 71 A. L. R. 1102 where it is stated: "In the early years of this statute, until the decision of Mr. Justice Story in *Swift* v. *Tyson* * * * it was pretty generally conceded, in many cases decided by the Supreme Court of the United States, that decisions of state courts were binding on federal courts in matters not involving the Constitution, statutes or treaties of the United States even though they did not involve the construction of local statutes (citing cases)."

when there is involved either state statutes or a state court's decision interpreting the same. The rule of this Court all during the period that *Swift* v. *Tyson* held sway was that the state court's decision on a state statute was "literally incorporated into the enactment, whatever the federal tribunal's opinion as to the correctness of the state court's views." *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, at 494, and cases there cited. Therefore, Petitioners' true contention, stripped to its ultimate effect, is to assert that this Court is absolutely bound by a decision of a state court construing a statute of that state even though a federal constitutional question is involved.

The cases relied upon by this Court in the *Rouse Case* itself fully answer the very argument now urged by Petitioners. The first case cited in the *Rouse Case* was *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518. In that case the Trustees of Dartmouth College held office pursuant to a grant from the English Crown. The question involved was whether an act of the legislature of New Hampshire altering the terms of that charter was void because of its repugnance to the Federal Constitution in that it impaired the obligations of a contract. Mr. Chief Justice Marshall stated that:

> "The single question now to be considered is do the Acts to which the verdict refers violate the Constitution of the United States?"

Construing the legislative contract he stated that:

> "It becomes then the duty of the Court most seriously to examine this charter and to ascertain its true character."

As to the presence of the necessary elements of a contract and as to the existence of a contract he held:

> "The opinion of the court, after mature deliberation is that this is a contract, the obligation of which

cannot be impaired without violating the Constitution of the United States."

Having determined that there was a contract, he stated:

> "We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers."

And, answering that question, he held:

> "It results from this opinion that the acts of the legislature of New Hampshire * * * found in this cause are repugnant to the Constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiff. The judgment of the state court must therefore be reversed."

The *Dartmouth College Case* was most recently cited with approval by this court in *Helvering* v. *Northwest Steel Rolling Mills*, 311 U. S. 46, 51.

Relied upon and cited by this court in the *Dartmouth College Case* was the leading case of *Fletcher* v. *Peck*, 6 Cranch 87. This Court in *Wood* v. *Lovett*, 313 U. S. 362, 369, cited *Fletcher* v. *Peck* in support of "the settled rule of decision in this Court" that "the execution of the state's deeds constituted the execution or consummation of a contract" which is entitled to protection under the contract clause of the Federal Constitution.

The next case this Court relied upon in the *Rouse Case* was *The State of New Jersey* v. *Wilson*, 7 Cranch 164, decided as was *Fletcher* v. *Peck* by Chief Justice Marshall. Involved was an act of the legislature of New Jersey that granted the remanent of the tribe of Delaware Indians certain lands that should not "hereafter be subject to any tax." Later the New Jersey Legislature attempted to repeal the tax exemption. The state court in New Jersey held the repealing act valid and the

lands taxable. This court, relying upon *Fletcher* v. *Peck*, stated that the following question was involved.

> "The question, then, is narrowed to the inquiry whether in the case stated, a contract existed, and whether that contract is violated by the Act of 1804."

This Court held that the grant of the land to the Indians constituted a legislative contract and that the repealing act "certainly impaired" this contract and accordingly the New Jersey court was reversed.

The State of New Jersey v. *Wilson*, *supra*, was most recently relied upon by this court in *United States* v. *Bekins*, 304 U. S. 27, 52.

The cases relied upon by this Court in the Rouse Case which have just been commented on could not have been influenced by the doctrine of *Swift* v. *Tyson* because they were all decided before *Swift* v. *Tyson* had reared its ugly head.

The Piqua Branch of the State Bank of Ohio v. Knoop, 16 How. 369, and its associated cases were relied upon by this Court in the *Rouse Case*. In that case an Act of Ohio passed in 1845 provided that banks organized under said Act would be exempt from taxation if it paid to the state a sum not greater than 6% of said bank's profits and dividends. In 1851 the legislature of Ohio passed an act which in effect provided for taxation of all banks. The Supreme Court of Ohio held that the 1851 Act did not violate the contract clause of the Federal Constitution. On appeal this Court relied upon exactly the same cases relied upon in the *Rouse Case* that have been thus far reviewed in this brief and reversed the Supreme Court of Ohio holding that the Act of 1851 would impair the obligations of the legislative contract of 1845.

It is to be noted that substantially the same argument that petitioners now urge in the case at bar was urged upon this Court in the *Piqua Bank Case*, *supra*. In disposing of that argument this Court held:

> "The rule observed by this Court to follow the construction of the statute of the State by its Supreme Court is strongly urged. This is done when we are required to administer the laws of the State. The established construction of a statute of the State is received as a part of the statute. But we are called in the case before us not to carry into effect a law of the State, but to test the validity of such a law by the Constitution of the Union. We are exercising an appellate jurisdiction. The decision of the Supreme Court of the State is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment. To follow the construction of a state court in such a case would be to surrender one of the most important provisions in the Federal Constitution."

In the *Ohio Life Insurance and Trust Company* v. *Debolt*, 16 How. 416, relied upon by this Court in the *Rouse Case*, the same act of the state of Ohio was involved that was involved in the Piqua Bank Case but the question was whether an insurance company organized under an act of the legislature other than the Bank Act of 1845 was entitled to the tax exemption feature of the Act of 1845. The Supreme Court of Ohio held that it was not and that the Act of 1851 imposing taxation did not impair any obligation of the legislative contract under which the insurance company was organized. Mr. Chief Justice Taney, who had theretofore dissented from the doctrine of *Swift* v. *Tyson* in *Lane* v. *Vick*, 3 How. 464, and who would, therefore, be expected to be in sympathy with the novel doctrine urged upon this Court in this case by Petitioners, wrote the opinion affirming the

Supreme Court of Ohio. The ground upon which the case was affirmed was that this Court, by the exercise of its independent judgment, agreed with the interpretation given the act of Ohio incorporating the insurance company by the state court but not on the ground that it was bound under Section 34 of the Judiciary Act to follow that state decision. In fact, Chief Justice Taney was very careful to point out the distinction, which of course is the complete answer to Petitioners' argument in the case at bar. He held:

> "It has been contended, on behalf of the defendant in error (the Treasurer of the State), that the construction given to these Acts of Assembly by the state courts ought to be regarded as conclusive. It is said that they are laws of the State, and that this Court always follows the construction given by the state courts to their own constitution and laws.
>
> "But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the State, although they should be made in the form of a law. For it would be impossible for this Court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties. It must necessarily decide whether the words used are words of contract, and what is their true meaning before it can determine whether the obligation the instrument created has or has not been impaired by the law complained of. And in forming its judgment upon this subject, it can make no difference whether the instrument claimed to be a contract is in the form of a law passed by the Legislature, or of a covenant or agreement by one of its agents acting under the authority of the State.
>
> "It is very true, that if there was any controversy about the construction and meaning of the Act of 1851, this Court would adopt the construction given

by the State Court. And if that construction did not impair the obligation of the contract as interpreted by this Court, there would be no ground for interfering with the judgment. For then the contract, as expounded here, would not be impaired by the state law. But if we were bound to follow not only the interpretation given to the law, but also to the instrument claimed to be a contract, and alleged to be violated, there would be nothing left for the judgment and decision of this Court. There would be nothing open which a writ of error or appeal could bring here for consideration and judgment; and the duty imposed upon this Court under this clause of the Constitution would, in effect, be abandoned."

The remaining cases relied upon in this Court in the *Rouse Case* expressly state that they are controlled by the *Piqua Bank Case, supra*, except *McGehee* v. *Mathis*, 4 Wall. 143, and *Gordon* v. *The Appeal Tax Court*, 3 How. 133, which cases merely repeat and rely upon the principles thus far noted.

By no stretch of the imagination can it be said that this Court in *The Washington University* v. *Rouse* predicated its decision or was influenced in any manner by the doctrine of *Swift* v. *Tyson*. Thus, the foundation upon which Petitioners base their argument is completely unsound and does not support the elaborate structure that they have erected thereon. If Petitioners' contention is correct, then this Court has lost its power to ever decide whether the contract clause of the Federal Constitution has ever been violated because all a state court need do to withdraw the appellate power of this Court, conferred upon it by the Constitution, is to declare that no contract under the state practice is present. Such a rule is not and cannot be the law.

Petitioners' Secondary Contention.

Petitioners progress from their erroneous contention that this Court relied upon the doctrine of *Swift* v. *Tyson* in deciding the *Rouse Case*, to the proposition that the only decision in Missouri free from the influence "of the evil and disastrous" doctrine of *Swift* v. *Tyson* (Petition p. 16), is the case decided by the Supreme Court of Missouri that the *Rouse Case* reversed. That case, contends Petitioners, is the case that this Court is now bound to follow under Petitioners' unique construction of *Erie R. Co.* v. *Tompkins*. Petitioners give lip service to the rule of this Court that it will "form its own judgment as to the existence and construction" of a legislative contract (Petition p. 16) but they demonstrate in the sentence following that it is only lip service that is rendered the rule. Their contention is there reduced to the asserted proposition that this Court is bound by what the state court decides are "the constituent elements of a contract" or in plain language—if the state court decides no contract is present, then this Court is bound to follow this declaration of law. Petitioners assert that because the Supreme Court of Missouri, in the case that the *Rouse Case* reversed, decided that there was no consideration for the legislative contract, this Court is bound by that decision. Being bound by that decision, Petitioners assert that this Court is required to hold that there is no contract and that therefore the obligations of a non-existent contract cannot be impaired.

Error in Petitioners' Secondary Contention

The fundamental error in Petitioners' theory is that it disregards the fact that this Court, when passing upon the federal question of whether the obligations of a contract have been impaired within the meaning of the con-

tract clause of the Federal Constitution, always exercises its independent judgment of whether a contract is present, what the obligations of such a contract are, and whether those obligations have been impaired by subsequent action. In determining whether a contract is present, this Court must exercise its independent judgment on the question of whether there is consideration to support the contract.

The very case that Petitioners urge this Court to now be bound by refutes the proposition urged upon this Court by Petitioners in the case at bar. The Supreme Court of Missouri, in the case that the *Rouse Case* reversed (42 Mo. 308), speaking of certain decisions of this Court cited it, held:

> "If they are upon the same point, and pass on the question presented in this case, they must be considered as decisive, for it appropriately belongs to that tribunal to put a final construction on the national constitution."

That those decisions were on the same point and were decisive was forever decided by this Court in the *Rouse Case*.

The contention concerning lack of consideration for the legislative contract was fully presented to this Court in the *Rouse Case*. Its disposition of the matter is apparent in the following quotation from the *Home of the Friendless Case*:

> "It is objected that there is no consideration stated in the Act for the release from taxation, which is claimed is necessary in order to uphold the contract. But this is a mistaken view of the law on this subject. * * *
>
> "These objects (to encourage education) were deemed by the Legislature to be beneficial to the

community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well settled doctrine of this court on the subject since the case of *Dartmouth College* v. *Woodward*, 4 Wheat. 519."

Petitioners quote much from the dissent of Mr. Justice Miller in the *Rouse Case* but fail to quote that portion of the dissent that completely contradicts Petitioners' fundamental theory in the case at bar. That dissent is prefaced with the following statement:

> "It is the settled doctrine of this court, that it will * * * decide whether a state law impairs the obligation of contracts * * *.
>
> "In this class of cases, when the validity of the contract is clear, and the infringement of it by the Legislature of a State is also clear, the duty of this Court is equally plain."

Mr. Justice Miller's position is rendered clear beyond all doubt in *Delmas* v. *Merchant Insurance Co.*, 14 Wall. 661, where he stated, writing the unanimous opinion for a court that was composed of all of the members of the court that decided the *Rouse Case*, the following:

> "It may be said that since we know that the Supreme Court of Louisiana has in other cases held this class of contracts void in their inception * * * we are bound to follow the state courts in that decision. But * * * this is not the class of questions in which we are bound to follow the state court * * *.
>
> "This court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by state legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the state courts giving such construction to the contract, or such decision concerning its validity, as to render the

power of this court of no avail in upholding it against unconstitutional state legislation."*

It must be remembered that Mr. Justice Miller on the same day that he dissented from the *Rouse Case* dissented from the doctrine of *Swift* v. *Tyson* as applied by this Court in *Butz* v. *City of Muscatine*, 8 Wall. 575. Mr. Justice Miller, had he been living, would have certainly joined the majority in *Erie R. Co.* v. *Tompkins*, but it is equally evident that he would not subscribe to the theory urged upon this Court by Petitioners as to the effect of that case. In his dissent in the *Muscatine Case* he pointed out that the principle of law involved in that case was unconcerned with any federal question requiring the exercise of the independent judgment of this Court. He stated that in that case there was not "any pretense that the statute as construed by the state court impairs the obligation of a contract."

This concept is expanded in Mr. Justice Miller's dissent in *Gelpcke* v. *Dubuque*, 1 Wall. 175, wherein he objected to the extension of the doctrine of *Swift* v. *Tyson*. In the argument of the *Gelpcke Case* the case of *Ohio Life Insurance & Trust Co.* v. *Debolt*, 16 How. 416 (heretofore discussed in this brief), was cited as an example of this Court following the decision of a state court. Although dissenting from the doctrine of *Swift* v. *Tyson*, Mr. Justice Miller clearly pointed out that the reason why the *Debolt Case* affirmed the state court was not because this Court was bound by the state decision but because this Court by the exercise of its independent judgment had decided the federal question in the case in the same

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*See also the following opinion written by Mr. Justice Miller sustaining the same proposition. *Bridge Proprietors* v. *Hoboken Land & Improvement Company*, 1 Wall. 116; *Northwestern University* v. *People*, 9 Otto 309.

manner as had the state court. Commenting on substantially the same argument then urged upon this Court that is now urged by Petitioners in the case at bar, Mr. Justice Miller held:

> "It requires but a bare statement of the proposition to show that, if admitted, the jurisdiction of said Supreme Court to sit as a revisory tribunal over the state courts, in cases where the state law is supposed to impair the obligations of a contract, would be the merest sham."

In *Bridge Proprietors* v. *Hoboken Land & Improvement Co., supra,* Mr. Justice Miller quoted with approval the following language from *Jefferson Branch Bank* v. *Skelley,* 1 Black 436, to give the fundamental reason why Petitioners' argument is unsound:

> "Of what use would the appellate power of this court be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide independently of all adjudication by the supreme court of the state whether the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of the state. It was never intended and cannot be sustained by any course of reasoning that this Court should or could with fidelity to the Constitution of the United States follow the supreme court of a state in such matters when it entertains a different opinion."

The many cases decided by this Court holding that the claim in a state court that a state constitution or a state statute is invalid because it impairs the obligation of a contract presents a federal question and that this Court, when reviewing a judgment of a state court in a case in which the question of impairment of contract

obligations is involved, will determine for itself the existence, construction, and validity of the contract, as well as the further question whether the impairment of its obligation has been effected by state legislation, are collected and annotated in 51 L. ed. U. S. 619, 628. This annotation is supplemented in 67 L. ed. U. S. 884, 890, and in 72 L. ed. U. S. 802, 804.

Looking now to the cases decided in the interim between those cited in the last annotation and those cases decided before *Erie R. Co.* v. *Tompkins*, we note no change of opinion.

Coombes v. *Getz*, 285 U. S. 434, 441, held:

> "The decision of the supreme court of a state construing and applying its own constitution and law generally is binding upon this Court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this Court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that contract has been impaired; and likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected."

Phelps v. *Board of Education*, 300 U. S. 319, 322, held:

> "This Court is not bound by the decision of a state court as to the existence and terms of a contract, the obligation of which is asserted to be impaired, but where the statute is claimed to create a constitutional right we give weight to the construction of the statute by the courts of the state."

Hale v. *Iowa State Board of Assessment and Review*, 302 U. S. 95, 101, held:

"The power is ours, when the impairment of an obligation is urged against the law, to determine for ourselves the effect and meaning of the contract as well as its existence."

Indiana ex rel. Anderson v. *Brand*, 303 U. S. 95, 101, held:

"* * * In order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the state has, by later legislation, impaired its obligation."

New York Rapid Transit Corporation v. *New York*, 303 U. S. 573, 593, in which case a petition for rehearing was denied the same day that *Erie R. Co.* v. *Tompkins* was announced, held:

"This Court, in construing a contract to determine whether or not legislation is violative of its provisions within the meaning of the contract clause of the Constitution, will examine for itself the existence and meaning of the contract as well as the relation of the parties and the circumstances of its execution."

The cases decided subsequent to the decision of *Erie R. Co.* v. *Tompkins* have not changed this rule one iota—demonstrating beyond any question that the decision in that case cannot be said to have the effect ascribed to it by Petitioners in the case at bar.

In *Higginbotham* v. *Baton Rouge*, 306 U. S. 535, 538, it was held:

"* * * This Court, in applying the contract clause of the Constitution, must reach an independent judgment as to the existence and the nature of the alleged contract * * *."

American Toll Bridge Co. v. *Railroad Commission of California*, 307 U. S. 486, 490, held:

> "Upon the issue whether the order is repugnant to the contract clause * * * this Court, while inclining to the state court's construction, will decide for itself whether, as claimed by appellant, the franchise by contract limits assertion of sovereign powers to regulate tolls (citing cases) and, if it plainly appears that it does, this Court will not hesitate so to adjudge,"

The following quotation from an annotation entitled "State court decisions as rule of decision in Federal courts since the overruling of the doctrine of *Swift* v. *Tyson*," appearing in 83 L. ed. U. S. 519, admirably summarizes the reasons given in the various decisions heretofore cited by Respondent as to why *Erie R. Co.* v. *Tompkins* has no effect on the case at bar. It is there stated at 520:

> "As the freedom of the Federal courts from the duty of following state precedents in cases involving Federal questions, Federal statute or Constitution, does not spring from the doctrine of *Swift* v. *Tyson*, but directly from the Federal statute expressly excepting from its operation such cases, the doctrine of *Erie R. Co.* v. *Tompkins* must of necessity leave untouched questions dependent upon the construction or application of a Federal statute or the Constitution of the United States, and is in fact confined to questions other than Federal questions, and those in which the jurisdiction of the Federal courts is invoked on the ground, not of a Federal question, but of diversity of citizenship."*

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*See also annotation to *Erie R. Co.* v. *Tompkins* in 114 A. L. R. 1500, at 1501, where it is stated: "Of course, the effect of the decision * * * is not to make state court decisions binding on Federal courts in cases where, even in the absence of the rule of *Swift* v. *Tyson*, the Federal court would be under no duty to follow such decisions." Such is the situation presented in the case at bar.

Some members of the bar in addition to Petitioners have attempted to give *Erie R. Co.* v. *Tompkins* a more far reaching

It is therefore apparent that this Court prior to the decision of *Swift* v. *Tyson*, during the period when the doctrine of *Swift* v. *Tyson* was recognized, and after the doctrine of *Swift* v. *Tyson* was overruled, has always determined for itself whether a contract was in existence, whether it was supported by sufficient consideration, what its obligations were, and whether those obligations had been impaired. The reason why it has taken this consistent action for well over a century is because the decision of the question involved is a federal constitutional question entirely disassociated from the doctrine of *Swift* v. *Tyson* and because it presents a situation, where if this Court considered itself bound to follow a state decision, the appellate jurisdiction of this Court would be a sham, and the constitutional duty imposed upon this Court would in effect be abandoned.

POINT TWO.

There Is No Valid Reason Requiring This Court to Re-Examine the Case of The Washington University v. Rouse, 8 Wall. 839.

Petitioners' implied request for a re-examination of *The Washington University* v. *Rouse* is bottomed principally on the contention that this Court has an "expressed changed opinion" in regard to that case (Petition p. 11).

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effect than is warranted by that decision. When such attempts have been made this court has consistently refused to follow. Cf. *Jackson County* v. *U. S.*, 308 U. S. 343, at 349: "Whatever rule we fashion is ultimately attributable to the Constitution, Treaties, or Statutes of the United States, and does not owe its authority to the law making agencies of Kansas." *Deitrick* v. *Greanery*, 309 U. S. 190, at 200: "A point (is) much discussed in brief and argument, upon the assumption that local law will guide our decision, see *Erie R. Co.* v. *Tompkins* * * * but it is a Federal statute which condemns as unlawful Respondent's acts * * * (this) involves decision of a Federal, not a state, question."

This, of course, erroneously assumes as a major premise that the Rouse Case was decided on the doctrine of *Swift* v. *Tyson*, which we have heretofore demonstrated to be untrue. The Court is referred to that discussion under Point One herein.

Petitioners advance several minor contentions in addition to their argument concerning the effect of *Erie R. Co.* v. *Tompkins* in support of their request. Basically they are that it was beyond the power of the Missouri Legislature to exempt Respondent from taxation and that even assuming that power there was really a reservation of amendment present in the Missouri Constitution of 1820.

Directly deciding these propositions, *The Washington University* v. *Rouse*, 42 Mo. 308, the case upon which Petitioners seek to have this Court rely, specifically holds against Petitioners on this point. It held:

> "When the law was passed granting the charter, there was no express prohibition restraining the legislature from exempting property from taxation * * *."

This is likewise affirmed by the two recent decisions of the Supreme Court of Missouri wherein the identical argument was presented to that court. It held in *The Washington University* v. *Baumann* and re-affirmed in the case at bar the following:

> "The State Constitution of 1820, in force at that time (of the granting of the charter), imposed no limitation upon the legislative power to enact local or special law, or laws granting exemption from taxation."

This Court in the *Rouse Case* held:

> "It is proper to say that the present Constitution of Missouri prohibits the Legislature from entering

into a contract which exempts the property of an individual or corporation from taxation; but when the charter in question was passed there was no constitutional restraint on the actions of the legislature in this regard."

This Court has once, and the Supreme Court of Missouri has three times, ruled this proposition against Petitioners. Even if this Court had not passed upon the matter, the three decisions of the Supreme Court of Missouri would be given great weight and marked influence. See *Higginbotham* v. *Baton Rouge, supra,* and cases cited therein, where it was held that although independent judgment is exercised as to the existence and nature of the contract "we attach great weight to the views of the highest court of the state" (See also cases cited in footnote 6 on page 11 of Petition). Petitioners' position concisely stated is that this Court shall attach no weight to the quoted decisions of the Supreme Court of Missouri and also require this Court to disregard its opinion in the *Rouse Case.* The opinions of the Supreme Court of Missouri in the *Baumann Case* and in the case at bar, while in harmony with the *Rouse Case* in this Court, clearly indicate that on the merits and independent of the *Rouse Case* it would have reached the same result.

The fact that this Court considered the Missouri Constitution of 1865 in the *Rouse Case* rather than the present Constitution of 1875 is immaterial. The Supreme Court of Missouri had under consideration the later Constitution of 1875 in its last two decisions on this question. It makes no real difference which constitution or what set of statutes are considered because any law attempting to tax Respondent is a violation of the contract clause of the Federal Constitution.

Petitioners rely greatly on Mr. Justice Miller's dissent in the Rouse Case. We have heretofore pointed out

that the basis for his dissent lends no support to Petitioners' principal contention regarding the asserted effect of *Erie R. Co.* v. *Tompkins*. His dissent was based primarily on the theory that it should be judicially determined that legislatures lack power to make contracts exempting property from taxation. Petitioners inferentially rely upon that theory.

The fact in this case that must not be lost sight of is that Respondent University was not one of the grasping manipulators described in the dissent by Mr. Justice Miller, but an educational institution which the Supreme Court of Missouri in the case at bar specifically excluded from that general condemnation. The Supreme Court of Missouri in the case at bar recognized that in some instances legislative abuses had been prevalent but that "in this instance, however, it cannot be said that the grant was improvident" for the reason that the University was established on "the principle (declared by all Missouri Constitutions) that education was essential to preservation of our rights and liberty. Verily, the same is true today." In fact, the Supreme Court of Missouri in the case at bar has held that to now impair the obligation of Respondent's legislative contract "would be to commit fraud."

The dissent of Mr. Justice Miller, rather than beginning a line of dissenting opinions comparable to those cited in *Erie R. Co.* v. *Tompkins* against the doctrine of *Swift* v. *Tyson*, was really one of the last dissents from a doctrine that even at the time of the writing of the *Rouse Case* this Court considered well settled. It is interesting to note that Mr. Justice Miller, Mr. Chief Justice Chase and Mr. Justice Field all either wrote or concurred in opinions written subsequent to their dissent in the *Rouse Case* affirming the very proposition that they dissented from in that case. See *Salt Company* v. *East Sagi-*

naw, 13 Wall. 373; *Erie Railway Co.* v. *Pennsylvania*, 21 Wall. 492; *Morgan* v. *Louisiana*, 3 Otto 217; *New Orleans Gas Light Co.* v. *Louisiana Light & Heat Producing and Manufacturing Co.*, 115 U. S. 650; *Grand Lodge of the State of Louisiana* v. *New Orleans*, 166 U. S. 143.

Mr. Justice Field's opinion in *Tomlinson* v. *Jessup*, 15 Wall. 454, for the unanimous court of which Mr. Justice Miller was a member, clearly shows that the proposition that a state lacks power to grant exemption from taxation had been abandoned by its former advocates. He held:

> "There is no subject of which it is of greater moment for the state to preserve its power than that of tax. It has, nevertheless, been held by the court, not, however, without occasional earnest dissent from a minority, that the power of taxation * * * may be surrendered by one legislative body, so as to bind its successors and the state."

It should be further noticed that in the case of *St. Anna's Asylum for the Relief of Destitute Females and Helpless Children of all Religious Denominations* v. *New Orleans*, 15 Otto 362, Mr. Justice Miller's dissent, concurred in by Mr. Justice Field, was not based on the ground of his dissent in the *Rouse Case* but based on the ground that he felt the language used in the legislative contract was not sufficiently explicit to require the exemption. Thus was abandoned the theory that he once held.*

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*Fairman: "Mr. Justice Miller and the Supreme Court 1862-1890" (1939) does not comment on the dissent to the *Rouse Case* in his chapter dealing with the leading opinions of Mr. Justice Miller at all and mentions the dissent only briefly in another place to note that "This doctrine was never acceptable to the majority of the court" (p. 211).

The argument urged by Petitioners was urged upon this Court in the very first case dealing with the contract clause. In *Fletcher* v. *Peck, supra,* it is stated:

> "The principle asserted is that one legislature is competent to repeal any Act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature."

Mr. Chief Justice Marshall disposed of the argument completely and held:

> "The correctness of this principle, so far as it respects general legislation, can never be controverted, but, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power * * *.
>
> "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community."

Georgia was the state involved in that case. Giving the reason why the Georgia legislature could not impair the obligation of her legislative contract, Mr. Justice Marshall held that:

> "She is a part of a large empire; she is a member of the American Union; and that Union has a constitution the supremacy of which all acknowledge, and which imposes limits on the legislatures of several states, which none claim a right to pass. The Constitution of the United States declares that no state shall pass any * * * law impairing the obligation of contracts."

This Court most recently acknowledged the authority of this declaration in *Wood* v. *Lovett, supra,* decided at the October, 1940, Term.

The dissent of Mr. Justice Miller rather than the majority opinion in the *Rouse Case* "has been worn away by the erosion of time" (*Tigner* v. *Texas*, 310 U. S. 141, 147). There has been no "drift away from" (*Olsen* v. *Nebraska*, 313 U. S. 236, 244) the *Rouse Case* by any decision of this Court for the Justices of this Court who concurred in the dissent in the *Rouse Case* fully abandoned their view expressed therein, thus leaving Petitioners without any authority to support their plea for a re-examination.

It was solely by reason of a procedural quirk that the Supreme Court of Missouri did not dispose of the case at bar on the non-federal ground of *res judicata*. It held that Petitioners' "plea of *res judicata* is upheld" by several Missouri decisions but that "we do not pass upon it because it is not before us" (The theory of those cited decisions is comparable to the decision of this Court in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381).

If there was ever a case where the doctrine of *stare decisis* should be applied the case at bar presents that case. This Court in the *Rouse Case* and the Supreme Court of Missouri in its two very recent cases have ruled against Petitioners. This Court held in *Helvering* v. *Hallock*, 309 U. S. 106, 119, that "we recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy unreasonable expectations."

In the case at bar there is no "collision with a prior decision more embracing in its scope, intrinsically sounder, and verified by experience." There are involved "rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves," and "interests" have been "created and maintained in reliance on those cases."

The Supreme Court of Missouri in the case at bar held that the legislative contract granted Respondent in 1853 has been "relied upon by it and at least some of its benefactors, as the evidence shows" and that to now at this late date allow an impairment of that contract "would be to commit fraud."

The decisions of this Court clearly show that after it has once determined the existence of a particular legislative contract, it has never, although urged to do so, changed its opinion on that matter but that it has considered the question foreclosed and no longer open for its consideration. *Piqua Branch Bank of Ohio* v. *Knoop, supra*, decided that the Bank Incorporation Act of 1845 passed by the Ohio legislature was a legislative contract. This Court stated that it was bound by this determination in the following cases: *Dodge* v. *Woolsey*, 18 How. 331; *Mechanics & Traders Bank* v. *Debolt*, 18 How. 380; *Mechanics & Traders Bank* v. *Thomas*, 18 How. 384; *Jefferson Branch Bank* v. *Skelley, supra; Franklin Branch Bank* v. *State Bank of Ohio*, 1 Black 474, and *Wright* v. *Sill*, 2 Black 544. The last cited case at 545 held:

> "Whatever differences of opinion may have existed in this Court originally in regard to these questions * * * are now concluded by these adjudications."

Hartman v. *Greenhow*, 102 U. S. 672, decided that the Act of 1871 of the state of Virginia relating to the liquidation of state debt by bonds and tax-receivable coupons was a legislative contract. This was reaffirmed in *Antoni* v. *Greenhow*, 107 U. S. 769, and in the *Virginia Coupon Cases*, 114 U. S. 269. This Court in both *McGahey* v. *State of Virginia*, 135 U. S. 662, 668, and in *McCullough* v. *Commonwealth of Virginia*, 172 U. S. 102, 108, held that:

"* * * This question, therefore, must be considered as foreclosed, and no longer open for consideration."

POINT THREE.

The Case of Trustees of Phillips Exeter Academy v. Exeter, 90 N. H. 472 (Unofficially Reported 11 Atl. 2d 569), Does Not Support Petitioners' Contention.

Petitioners confidently assert that there is an "existing confusion on" the question raised by them concerning the effect of *Erie R. Co.* v. *Tompkins* and that the Supreme Court of New Hampshire in *Trustees of Phillips Exeter Academy* v. *Exeter, supra,* "held exactly contrary to the Missouri Supreme Court," quoting from the unrevised opinion of the Supreme Court of New Hampshire in that case as reported in the Atlantic Reporter (Petition p. 12).

The difficulty in Petitioners' contention is that the Supreme Court of New Hampshire, pursuant to a motion for re-hearing, revised its opinion, corrected its error relating to the effect of *Erie R. Co.* v. *Tompkins* so that instead of holding contrary to the decision of the Supreme Court of Missouri in the case at bar that case is in complete accord with it, thus causing the asserted confusion to vanish.

The revised opinion of the Supreme Court of New Hampshire in the Phillips Exeter Academy Case is officially reported in 90 N. H. 472.

The fundamental changes made in the official opinion is best illustrated by quoting the language relied upon by Petitioners as set out on page 12 of the Petition, to which we have added in italics the language added by the Supreme Court of New Hampshire and striking the

language stricken by that court in its official opinion. The portion quoted by Petitioners, as it *now* appears corrected in the official opinion of the Supreme Court of New Hampshire, reads as follows (90 N. H. 472, 483):

> "The Federal Constitution requires no enforcement of invalid contracts, and the states, not the nation, now determine between valid and invalid contracts *unless a question under that Constitution is presented.* In all other cases, upon the issue of construction of state legislation, the state's own common law now controls, even when federal jurisdiction may be asserted in ~~passing upon it~~ *applying and enforcing it.* The theory of a common law of a nation, adopted in *Swift* v. *Tyson*, 16 Peters 1, 8, decided in 1842, has been abandoned by the case of *Erie R. R. v. Tompkins*, 304 U. S. 64, ~~58 S. Ct. 518, 82 L. Ed. 1188, 114 A. L. R. 1487~~. The federal courts now follow a state's own judicial construction of all its laws ~~not involving federal authority~~ *when no issue* of federal authority arises, determining *in independent judgment* the state law only when its conflict *with the federal constitution or acts of Congress is claimed.* Decision of the validity of the plaintiff's exemption ~~as irrevocable~~ is therefore to be reached by determination of the local law."

Immediately following this quotation, the Supreme Court of New Hampshire added two completely new paragraphs in its revised opinion appearing in 90 N. H. that were entirely absent from the opinion as reported in the Atlantic Reporter, prefacing the same with the statement that:

> "* * * *the Erie Railroad Case does not affect the authority of the United States Supreme Court to act independently in passing on the validity of the plaintiff's exemption here in issue* * * *."

Similar correction is made by the Supreme Court of New Hampshire of the second quotation made by Peti-

tioners from page 584 of 11 Atl. 2d in its revised opinion as reported on page 493 of 90 N. H.

In 88 U. of Pa. L. Rev. 1013, the unofficial opinion in the Phillips Exeter Academy Case as reported in the Atlantic Reporter was commented on and the fundamental error which was corrected in the official opinion was noted:

> "However, a serious flaw exists in this reasoning. The decision assumes that the federal court must reach the same result, since it is claimed that under *Erie R. R.* v. *Tompkins*, they must accept the state court's decisions as to whether or not a valid contract exists. Apparently overlooked is the fact that impairment of the contract is a federal question, and that both before and after the Erie Case, the federal courts have *independently* determined the existence of the contract whose impairment is disputed. Plainly, a contrary policy would make a sham of the constitutional provision, since every state court could logically follow the instant decision."

It is thus apparent that the one case relied upon by Petitioners does not actually support their contention but holds directly contrary to their theory. The official opinion of the Supreme Court of New Hampshire is in complete accord with the decision in the case at bar and both cases follow the authority of this Court as consistently declared for over one hundred and thirty years.

Conclusion.

During the long period of history that this Court has considered cases involving the contract clause of the Federal Constitution it has followed the rules hereinbefore set out, which rules are directly contrary to Petitioners' basic assertion that *Erie R. Co.* v. *Tompkins* has in some manner altered the practice of this Court in determining federal constitutional questions.

Petitioners' arguments have been fully and fairly presented to the Supreme Court of Missouri and that court, following its own recent decision and the decision of this Court in the *Rouse Case*, completely answered all of the arguments here advanced. The one case from New Hampshire that Petitioners cited for authority has by that court been corrected and so altered that there cannot now be any possible confusion on the matter.

It is submitted therefore that for the reasons hereinbefore stated Petitioners have failed to show any of the reasons which under Rule XXXVIII of this Court is a ground for Certiorari. The petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1941.

No. 711.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri,

Petitioners,

v.

THE WASHINGTON UNIVERSITY,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S BRIEF.

GEORGE WHARTON PEPPER,
ROBERT B. CALDWELL,
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IN THE

Supreme Court of the United States.

No. 711. October Term, 1941.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri,

Petitioners,

v.

THE WASHINGTON UNIVERSITY,

Respondent,

On Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT'S BRIEF.

I.

SUMMARY OF FACTS.

The respondent was organized pursuant to a Missouri statute entitled "An Act to Incorporate the Eliot Seminary.", approved February 22, 1853, Laws 1852-3, Page 290 (R. 4). Section 1 of the Act provided that the incorporators "and their associates and successors are hereby constituted a body corporate and politic by the name of 'The Eliot Seminary' and by that name shall have perpetual succession and be capable of taking and holding by gift, grant, devise or otherwise, and conveying, leasing or otherwise disposing of any estate, real, personal or mixed, annuities, endowments, franchises, and other heredita-

ments which may conduce to the support of said Seminary, or to the promotion of its objects; *all property of said corporation shall be exempt from taxation* and the sixth, seventh and eighth sections of the first Articles of the Act concerning corporations, approved March 19th, 1845, shall not apply to this corporation." (Italics ours.)[1]

The State Constitution of 1820, in force at that time, imposed no limitations on the legislative power to enact local or special laws or laws granting exemption from taxation: *Washington University v. Baumann*, 341 Mo. 708, 712, 108 S. W. (2d) 403 (1937).

The chartering Act of 1853 was amended by the Legislature in 1857, Laws 1857, Page 210 (R. 5). Section 1 of this Act provided: "The name of the corporation known as 'The Eliot Seminary' shall henceforth be 'The Washington University', by which name the said corporation shall have, hold and enjoy all the property, rights, franchises, endowments, immunities and privileges conferred upon and belonging to The Eliot Seminary." Further sections forbade sectarian, religious or political instruction, and made other provisions for the government of the University, thus making it clear that the legislature desired to define the type of educational effort which it was authorizing.

Missouri adopted a new State Constitution in 1865. Section 27, Article IV, provided: "The general assembly shall not pass special laws . . . exempting any property of any named person or corporation from taxes." In 1866

[1] The Act of 1845 (R. S. 1845, Chapter 34, Page 232), referred to in the exempting clause, provided that the charter of every corporation thereafter granted by the Legislature should be subject to alteration, suspension and repeal in the discretion of the Legislature. (Sect. 7.)

the legislature enacted a new general tax law and pursuant thereto certain real estate of the University was for the first time assessed for taxation. One Edward S. Rouse (also spelled "Rowse"), Collector of St. Louis County, took steps to collect the taxes thus attempted to be imposed. At least three pieces of the realty assessed were productive property, held by respondent as investments and not directly used for educational purposes (R. 86). Respondent brought a suit for an injunction on the ground that its charter exempted its property from taxation. An injunction was granted by the lower court which was reversed on appeal in *Washington University v. Rouse*, 42 Mo. 308 (1868). Respondent sued out a writ of error and the judgment of the Missouri Supreme Court was dissolved by this Court in *Washington University v. Rouse*, 75 U. S. (8 Wall.) 439 (1869). The basis of the decision rendered by a divided Court was that respondent's charter was a contract and that the threatened taxation constituted an impairment of that contract under Article I, Section 10, of the Constitution. The dissenting opinion, while denying that the power of taxation could be bargained away, did not express disagreement with the majority that the charter in other respects constituted a contract.

No further attempt was made to tax any of respondent's property until 1931, when (pursuant to an act passed more than fifty years earlier) some sixty-two parcels of real estate owned by respondent in the City of St. Louis were assessed for State, City and School Taxes in the amount of $183,003.77. All except one of these parcels were productive. Respondent brought a suit against the Collector of St. Louis to enjoin the collection of these taxes; an injunction was issued by the court below; and the decree was affirmed on appeal in *Washington Uni-*

versity v. Baumann, 341 Mo. 708, 108 S. W. (2d) 403 (1937).

While the appeal in the *Baumann* case was pending in the Supreme Court of Missouri (to wit: on November 19, 1934), the present suit was brought against the Assessor and Treasurer of Kansas City to enjoin these officials from selling at a tax sale similar real estate of the respondent located in Kansas City. The officials attempted to justify under the same act which had been unsuccessfully invoked in the *Baumann* case. After a temporary injunction had issued, the case laid dormant until after the decision of the Missouri Supreme Court in the *Baumann* case and was then tried upon an amended petition which raised two issues: First, whether respondent's charter constituted a contract exempting all of its property from taxation and whether the asserted right of taxation constituted an impairment of that contract under the Federal Constitution; and, second, whether the issues were *res judicata* in view of the decisions in the *Rouse* and *Baumann* cases.

The instant suit involves taxes on one lot of Kansas City real estate for the year 1933 and three lots for the years 1934-1937, inclusive. The amounts of the tax bills are as follows: for the year 1933—$23.71; 1934—$7,245.37; 1935—$6,313.77; 1936—$5,724.83; 1937—$5,048.31 (R. 31-44). The financial importance of the suit to the University is of course much greater than these figures indicate. As mentioned above, the taxes involved in the *Baumann* case amounted to $183,000. for a single year, and these were assessed against some only of the respondent's property.

As the issues in the instant case and those in the *Baumann* case are identical, it was agreed that the transcript of the testimony in the *Baumann* case should be part

of the record in the instant case, and it was upon this record that the instant case was decided (R. 56).

This testimony was summarized by the Supreme Court of Missouri in the *Baumann* case as follows (p. 716):

> "The undisputed evidence shows that when The Washington University v. Rouse case was being litigated in the courts of this State and the United States Supreme Court between 1867 and 1871, the University owned only four pieces of income real estate not occupied and directly used for school purposes. The petition describes sixty-two parcels of real estate in St. Louis as being owned by it now. All except one parcel are income property only. The taxing authorities are not attempting to tax many other parcels owned and actually used by it for school purposes. (It appears the University also has substantial real estate holdings in St. Louis County, outside of the city, which have not been taxed.) The evidence treats only of sixty parcels in the city. Of these twenty-eight were gifts; six were obtained in exchange for other real estate; and twenty-six were purchased out of endowment funds and gifts. Ten of these twenty-six parcels were bought for a contemplated addition to the Medical School. The others were not acquired with a view to future occupancy and direct use by the University. It got the great bulk of its real estate in and after 1900. In that year twelve valuable parcels of land were received from Messrs. Samuel Cupples and Robert Brookings, covered by a blanket mortgage to the New York Life Insurance Company for a principal sum slightly exceeding $1,000,000 at the time of trial; but this encumbrance was being paid off at the rate of $50,000 per year. These twelve parcels were producing an income ranging between $335,000 and $392,000 per year, and the Collector made no effort to prove the conveyance thereof to the University, or the mortgage

thereon, was fraudulently executed. Practically all the sixty parcels of real estate were regarded by the University as being superior to stocks, bonds and real estate mortgages for investment purposes, especially during the period of the depression.

"Gifts to the University of more than $25,000 each aggregated $26,254,104 at the time of trial. This included all sorts of property, real estate, securities, bonds, stocks and cash. There had been other gifts of less than $25,000 each. The income of the University for the year ending June 30, 1932, from investments was $1,345,449.93, and from tuitions and fees $1,137,294.38, a total of $2,482,744.32. The expenses for that year were $2,363,573.55, leaving a balance of $119,170.77. The institution operates under a budget system and surpluses and deficits for any year usually do not exceed $3000. In most of the departments the tuition is $250 a year, and operating expenses run nearly $500 per year per student. In the Medical School the tuition is $400 per year and the University's annual operating cost per student is $1900. In the year 1932-3 scholarship fellowship funds were distributed to students amounting to $40,066; free scholarships amounted to $50,225, and student loans to $18,000. At the time of the trial the University in almost every department felt the need of further funds for expansion, particularly in the Medical School where it was desired to add a psychiatric institution. The number of students in 1930-1 was 7915; in 1932-3, 7313. We do not find any figures for the year 1931-2. In addition to the regular academic departments there are seven professional schools."

The evidence also established that certain benefactors had relied on the tax exemption clause in making their gifts (R. 103-4).

The Supreme Court of Missouri in the instant case, as in the *Baumann* case, held that respondent's charter exempted it from taxation. That Court further stated that (as there had been no cross-appeal) the issue raised by respondent's plea of *res judicata* was not before it but made the following significant comment: "We find the University's plea of *res judicata* is upheld by the decisions in *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979; and *North St. Louis Gymnastic Society v. James Hagerman, Jr.*, 232 Mo. 693, 135 S. W. 42."

It thus appears that in the *Rouse* case, which was a suit involving St. Louis and Missouri State taxes, this Court has upheld the validity of the respondent's tax-exemption; that in the *Baumann* case the Supreme Court of Missouri has reached the same conclusion where both St. Louis and Missouri State taxes were involved; and that in the instant case the last-mentioned Court has again sustained the exemption—this time as to taxes assessed against real estate in Kansas City. It further appears that the Missouri Court (in the *Baumann* case) has construed the exemption as applicable to *all* the property of respondent —whether real or personal and whether used directly for university purposes or as a producer of revenue for the attainment of those purposes and has observed, by way of dictum, that under all these circumstances *res judicata* is a valid plea.

II.

SUMMARY OF ARGUMENT.

The argument of the respondent is an amplification of the following propositions:—

1. This Court cannot be compelled to regard "the laws of the several States" as "rules of decision" in cases involving alleged violations of the Constitution of the United States; and the Judiciary Act of 1789, as construed in *Erie R.R. v. Tompkins*, attempts no such compulsion. In the instant case, however, the respondent recognizes no inconsistency between Missouri law and the law as laid down by this Court.

2. The power inherent in a Court to prevent repeated litigations of the same issue should be exercised in this case by affirming the decree of the Supreme Court of Missouri.

3. The exemption from taxation offered by the legislature of Missouri to the incorporators of respondent, by them accepted according to the terms of the grant and for ninety years treated as a part of respondent's financial structure, is a valuable contractual right which the State cannot constitutionally impair.

On the basis of these propositions the respondent respectfully urges that the judgment of the Supreme Court of Missouri be affirmed.

III.
ARGUMENT.

1. This Court Cannot Be Compelled to Regard "The Laws of the Several States" as "Rules of Decision" in Cases Involving Alleged Violations of the Constitution of the United States: and the Judiciary Act of 1789, as Construed in Erie RR. v. Tompkins, Attempts No Such Compulsion.

It is respectfully suggested that the petitioner has misconceived the decision in *Erie R.R. v. Tompkins*, 304 U. S. 64 (1938) and that the inference which he draws from it is essentially unsound.

That decision deals only with the situation in which federal jurisdiction depends solely upon diversity of citizenship. In that situation Congress has prescribed that the laws of the several States shall be regarded as rules of decision; and this Court has interpreted "laws" to include unwritten as well as written laws. Where (as here) the jurisdiction exists because a provision of the Constitution of the United States is drawn in question, the respect shown by this Court for State law is not the result of compulsion but of policy. Surely this policy will never be so extended as to result in an abdication of the constitutional function of this Court; but that is precisely what would happen if the petitioner's theory were to be accepted and acted upon.

Petitioner's argument runs substantially as follows: Under the law of Missouri the charter of respondent was not an enforceable contract because it lacked consideration; this Court, in *Washington University v. Rouse*, failed to follow the Missouri law and reached an independent con-

clusion that there was consideration for the contract; the court below in the case at bar followed the law as established by this Court rather than the law of Missouri; the decision of this Court in the *Rouse* case ignored the Missouri law, because of the rule of *Swift v. Tyson,* 16 Peters 1 (1842); *Erie R.R. v. Tompkins* has now overruled *Swift v. Tyson;* therefore, says petitioner, this Court must now revert to, and accept as binding, the conclusions of the Missouri court in *Washington University v. Rouse,* 42 Mo. 308.

There are two defects in such an argument, the first of which is fundamental. This is the assumption that by the *Erie* decision this Court has abdicated its constitutional function. This section of this brief is devoted to that point. The second is the assumption that an affirmance would be inconsistent with the law of Missouri. This latter assumption is based in turn upon the theory that the conclusions of the Missouri Supreme Court in the *Rouse* case represent the views of that Court today. This point will be discussed in a succeeding section.

The *Erie* case involved the construction of Section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, 28 U. S. C., Section 725. This section provides:

> "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In *Swift v. Tyson,* it had been held that Federal courts exercising jurisdiction on the ground of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court;

but that they are free to exercise an independent judgment as to what the common law of the State is or should be. (*Erie R. R. Co. v. Tompkins,* supra, p. 71.) The *Erie* decision was to the effect that a Federal court exercising jurisdiction on the ground of diversity of citizenship must, in every case, apply the State law as declared by the State courts.

This rule, however, has no application in cases involving the Constitution, treaties[2] or statutes[3] of the United States. As Mr. Justice Brandeis observed in the *Erie* case: The law to be applied in any case is the law of the State "*except in matters governed by the Federal Constitution or by Acts of Congress.*" (*Erie R. R. Co. v. Tompkins,* p. 78.)

In determining in the *Rouse* case that the charter of respondent was entitled to the protection of the Constitution, this Court was not following the rule of *Swift v. Tyson.* It was applying a principle which was in existence before *Swift v. Tyson* was conceived and which has been followed consistently since *Swift v. Tyson* has been overruled—namely, that in cases involving the asserted impairment of a contract under Article I, Section 10 of the Constitution, this Court will itself determine whether a contract existed, what were its terms and conditions, and whether that contract had been impaired. While this Court has always given great weight to the decisions of State courts and, in doubtful cases, has always adopted the construction placed upon the contracts or statutes by the State courts, it has never abdicated its right to apply its own independent

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[2] *Board of County Commissioners of Jackson County v. U. S.,* 308 U. S. 343 (1939).

[3] *Deitrick v. Greaney,* 309 U. S. 190 (1940). *Baltimore & Ohio R. R. Co. v. Kepner,* 86 L. Ed. 37 (1941).

judgment.[4] This right is a necessary result of the supremacy of the Constitution and of the vesting in this Court of the judicial power of the United States.

At the time this brief is written, the latest expression of the rule is contained in an opinion by Mr. Justice Jackson, in the case of *Irving Trust Company, et al. v. Day*, 86 L. Ed. 349 (1942). In a case involving an asserted conflict between an antenuptial agreement and the New York Decedent Estate Law, it was there said:

> "When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court."[5]

Petitioner concedes that this is the law (Petitioner's brief, p. 9), but asserts that this Court must adopt the decision of the State court unless it is "wholly arbitrary and contrary to reason." It is, of course, the settled policy

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[4] Of the earlier cases giving expression to the rule, the following may be cited: *Piqua Branch Bank v. Knoop*, 57 U. S. (16 How.) 369 (1853); *Jefferson Branch Bank v. Skelly*, 66 U. S. 436 (1862); *Bridge Proprietors v. The Hoboken Co.*, 1 Wall. 116 (1863); *Delmas v. Merchant Insurance Co.*, 14 Wall. 661 (1871).

[5] Other recent expressions are to be found in *Hale v. State Board*, 302 U. S. 95 (1937), opinion by Mr. Justice Cardozo; *Indiana, ex rel. Anderson v. Brand*, 303 U. S. 95 (1938), opinion by Mr. Justice Roberts; *Rapid Transit Corp. v. New York*, 303 U. S. 573 (1938), opinion by Mr. Justice Reed; *Higginbotham v. City of Baton Rouge*, 306 U. S. 535 (1939), opinion by former Chief Justice Hughes; *Wood v. Lovett*, 313 U. S. 362 (1941), opinion by Mr. Justice Roberts.

of this Court to lean toward agreement with the courts of the State and to accept their judgments in determining whether a given set of facts gives rise to a contract. On the other hand, as petitioner admits, there are cases where this Court recognizes its obligation to reach its own independent conclusion. This occurs, among other situations, where the State court ruling is so far out of line with prevailing contract principles that it operates to deprive a party to the contract of his constitutional protection against impairment. If it were otherwise, as this Court has often observed: "the contract provision could always be evaded by the State courts giving such construction to the contract, or such decision concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional State legislation": *Delmas v. Merchant Insurance Company*, 14 Wall. 661 (1871).

The *Rouse* case was just such a decision. It did not involve doubtful questions of construction or the interpretation of intricate statutory provisions. On the contrary the ruling of the State Court in that case was that the grant of respondent's charter was without consideration and was therefore not contractual in its nature. This ruling constituted a marked and unjustifiable departure from the generally accepted principle that the charter of such a corporation as the respondent, accepted by the incorporators and acted upon in good faith, is based upon an adequate consideration and is therefore entitled to constitutional protection.

Petitioner's argument, if accepted, would leave this Court powerless to correct the errors of a State court in this or any other similar situation. We submit that such is not, and cannot be, the law.

2. The Power Inherent in a Court to Prevent Repeated Litigations of the Same Issue Should Be Exercised in This Case by Affirming the Decree of the Supreme Court of Missouri.

Apart from his argument as to the effect of the *Erie* decision, petitioner contends that the Court below should be reversed because *Washington University v. Rouse*, 75 U. S. (8 Wall.) 439 (1869) was wrongly decided.

For the reasons given in the next section of the brief, we submit that the *Rouse* case was correctly decided. Apart from the merits, however, it is our proposition that the issues here presented, having been litigated on three occasions, should be considered as settled.

This case is an unusual one. Unlike the ordinary case to come before this Court, it does not require the application of general principles to a new set of facts. On the contrary, the identical legal issues have been raised and have received judicial determination in three cases, all brought by local tax collectors of Missouri and involving the same type of property—first, in the *Rouse* case, decided by this Court; second, in *Washington University v. Baumann, supra;* and again by the Supreme Court of Missouri in the case at bar. Each case has been determined favorably to respondent.

The *Rouse* case involved an attempted assessment of State, Military, County and School Taxes against the property of respondent by the Collector of Revenue of St. Louis County. It is a fact of record that Rouse attempted to assess taxes against several pieces of productive property (R. 86). This Court held that the charter in terms exempted the property from taxation and that the charter was a contract, and so entitled to protection against im-

pairment. The decision applied to the case the principles of *Home of the Friendless v. Rouse*, 75 U. S. (8 Wall.) 430 (1869), decided the same day against the same collector on a charter involving identical language.

The *Baumann* case was decided in 1937. The taxing official in that case was the Collector of the City of St. Louis. The taxes involved were State, City and School Taxes. The real estate was also productive property. Once again it was held that the property was tax-exempt. The court also took occasion to dismiss the further contention advanced by the taxing authority that changed conditions, reflected by a substantial increase in the amount of property owned by the University since 1869, when the *Rouse* case was decided, opened the way for its taxation. The theory underlying this contention was that the University had absorbed more property than necessary to accomplish the purpose for which it was chartered; i. e., the maintenance of an educational institution of high merit. The contention was based upon a *dictum* in the majority opinion of this Court in the *Rouse* case to the effect that "should a state of case in the future arise, showing that the corporation has pursued a different line of conduct [that is, has increased its property holdings beyond its charter requirements], it will be time enough then to determine the rights of the parties to this contract, under the altered condition of things" (p. 441). In making this observation, this Court stated that such an abuse was not to be feared or presumed. The Missouri Supreme Court found no evidence warranting such a fear or presumption. It concluded that the additional property acquisitions were not beyond the needs of the University as an educational institution, and consequently not *ultra vires* in character. In so deciding, the Court stated:

> "And if a determination of that question be requisite to an ascertainment of the corporation's liability for taxes the general rule is that it can be raised only by the State in a direct proceeding for that purpose (authorities cited)."

So, as late as 1937, the Missouri Supreme Court was unimpressed with the assertion that the property holdings of the University had increased to such a size that they were beyond its educational needs and represented *ultra vires* acts. The instant record reveals no change. Indeed, petitioner agreed below that the testimony in the *Baumann* case be adopted as the evidence in this case.

Summarizing, we find that the judgments in the *Rouse* and *Baumann* cases are express and definitive adjudications of the following issues:

(1) The charter of Washington University is a valid contract within the protection of Article I, Section 10, of the United States Constitution, which may not be impaired by subsequent legislation.

(2) The tax exemption clause is an enforceable part of the contract, and not subject to revocation.

(3) The tax exemption clause embraces within its scope all property owned by the University, with the sole limitation that the property itself, or the income received therefrom, must be used in aid or support of its educational functions.

(4) The tax exemption clause is not limited in its operation to property originally acquired by the University, but extends to all property—no matter when obtained—if used, directly or indirectly, for educational purposes.

In the instant case, the taxing officials are the City Treasurer and the City Assessor of Kansas City and, again, the subject matter of the suit is productive real estate. The taxes involved are general city taxes. The issues presented are identical. In fact, they could not be otherwise, as the evidence is the same.

Under these circumstances, we submit that the instant case should be affirmed on the principle of *res judicata*.

It is established that the doctrine of *res judicata* applies in tax cases, and this is so even though the taxes in the prior litigation are for different years than those in the subsequent suit: *New Orleans v. Citizens' Bank*, 167 U. S. 371, 398 (1897); *Tait v. Western Md. Ry. Co.*, 289 U. S. 620, 624 (1933); *U. S. v. Stone and Downer Co.*, 274 U. S. 225, 230-231 (1927). It is true that where different tax years are involved, the original adjudication does not act as a complete bar to subsequent litigation but is merely conclusive as to all matters actually litigated and adjudicated in the prior suit: *Tait v. Western Md. Ry. Co.*, (supra, p. 623); *Va.-Car. Chemical Co. v. Kirven*, 215 U. S. 252 (1909). This limitation, however, does not forbid the operation of *res judicata* in the instant case. The identical issues here raised were litigated and adjudicated in the *Rouse* and *Baumann* cases. Finally, in the application of *res judicata*, it is immaterial that the original adjudication may have been predicated upon an erroneous concept of the law. *Deposit Bank v. Frankfort*, 191 U. S. 499, 510-511 (1903); *U. S. v. Moser*, 266 U. S. 236, 242 (1924); *Reed v. Allen*, 286 U. S. 191, 199 (1932). Of course, this observation does not concern us here because, as will be shown in the ensuing discussion, the legal principles applied in the *Rouse* and *Baumann* cases were correct.

The Missouri concept of *res judicata* in tax cases is identical with the principles as applied by this Court in similar cases: *Kansas City Exposition Driving Park v. Kansas City*, 174 Mo. 425, 74 S. W. 979 (1903); *North St. Louis Gymnastic Society v. James Hagerman, Jr.*, 232 Mo. 693, 135 S. W. 42 (1911), both involving the taxable status of corporations under their charters. We mention this because the effect to be given a judgment of a State court is a question to be determined by the State or local law: *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 75 (1903); *Wright v. Georgia R. R. & Banking Co.*, 216 U. S. 420, 429 (1910); *Oklahoma Packing Co. v. Gas Co.*, 309 U. S. 4 (1939). As the law of Missouri parallels that of this Court with respect to *res judicata*, both the *Rouse* judgment and that rendered in the *Baumann* case are to be given similar weight. The Missouri Supreme Court in the instant case found that the University's plea of *res judicata* is upheld by the decisions in *Kansas City Exposition Driving Park v. Kansas City* and *North St. Louis Gymnastic Society v. James Hagerman, Jr.*, supra. In making this observation, the Court did say that the plea of *res judicata* was not before it, for technical reasons of a procedural nature; but there was no occasion for that Court to decide the issue of *res judicata*, since it had already ruled in favor of respondent on the merits. As *res judicata* was pleaded and proved by respondent, this Court should, as a matter of right and justice, affirm the judgment in favor of respondent on that ground, if it believes that the Missouri Supreme Court erred in its decision on the merits.

In asking this Court to apply the rule of *res judicata* to the case at bar, we are frank to admit that in the literal sense of the term, there is no identity of parties. The

Kansas City officials, who are petitioners here, were not parties in the *Rouse* and *Baumann* cases. On the other hand, two facts are present which we submit are sufficient to establish substantial identity for the purposes of the rule. In the first place, the defendants in the two former cases were collecting State as well as local taxes, and hence were agents of the State in fact as well as in theory. This being so, we think it is fair to say that the prior judgments were binding on the State of Missouri. If the State is bound, then all municipal subdivisions to which the State has delegated taxing power should also be bound. In the second place, petitioner agreed to adopt the evidence in the *Baumann* case as the evidence in this case. This is a concession that petitioner was entirely content to accept the *Baumann* record as definitive of the issues. Therefore, petitioner can have no cause for complaint if he is placed in the shoes of Baumann for other purposes.

The function of the doctrine of *res judicata* is to make for certainty in human relations by giving repose to litigation and preventing constant reconsideration of settled questions. Beyond this, it has the incidental advantage of relieving the courts of the burden of hearing the same issues litigated between the same parties or their privies on more than one occasion. If the principle of *res judicata* cannot be invoked in this case, it is difficult to imagine when an end can be expected to litigation.

But even if this Court feels that all of the elements of *res judicata* are not present, we submit that the prior decisions should be considered as binding. If the issues are *res judicata*—minus, they are at least *stare decisis*—plus. Equity has always recognized the right of a court to prevent unnecessary relitigation by numerous parties where common questions of fact or law are involved. A familiar

example is to be found in the class suit. Here a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them as if all were before the court.[6] The reason behind the rule is that continued litigation on the same question is unnecessary, where the interests of all are properly protected in the initial action.

The instant case presents an analogous situation, and the reasons for calling a halt to litigation are the same. The problems involved were maturely considered by this Court in the *Rouse* case; they were again examined at length and on the merits by the Supreme Court of Missouri in the *Baumann* case; and a third time by the Court below. Every possible issue has previously been presented and decided; and petitioner's acceptance of the testimony in the *Baumann* case is conclusive evidence that he considered the former record to be satisfactory.

In view of the fact that respondent's property has been accorded tax exemption for almost ninety years, despite three assaults upon it, it is submitted that the principle should now be considered as settled and that it would serve no useful purpose to re-examine the question. A decision of this Court, and two subsequent decisions by the highest

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[6] See for example, *Hartford Life Insurance Co. v. Ibs*, 237 U. S. 662 (1915), where a decree in a class suit involving a mortuary fund was held entitled to full faith and credit in a second suit by a member of the class not a party to the first suit; and *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356 (1921), involving a class suit respecting the control of trust funds belonging to a fraternal benefit association, in which it was held that the District Court might properly enjoin members of the class, not parties to the first suit, from bringing a second suit to reopen the questions.

court of the State of Missouri, should be enough to set the matter at rest where no new points are presented for adjudication.

3. The Exemption From Taxation Offered by the Legislature of Missouri to the Incorporators of Respondent, by Them Accepted according to the Terms of the Grant and for Ninety Years Treated as a Part of Respondent's financial Structure, Is a Valuable Contractual Right Which the State Cannot Constitutionally Impair.

If this Court does not accept the view that sufficient judicial attention has already been given to the tax exemption clause in this charter and prefers again to consider that matter, we suggest that the issue may properly be stated thus:—whether a tax-exemption clause in the charter of an educational institution is valid and irrevocable where (1) there was no local constitutional impediment to the granting of the exemption; (2) the exemption clause itself is unambiguous and clearly embraces the type of property involved; and (3) there is no showing either of any abuse of legislative power in the original grant or of any such present local emergency as might justify relaxation of a constitutional guaranty.

The respondent urges that upon such a record this Court should declare the exemption contract to be inviolable; and further suggests that the discharge by this Court of its constitutional function is made less drastic in the instant case because there is no sufficient reason to believe that the law of Missouri on the point in issue differs in any degree from the law as declared by this Court.

The following considerations are advanced to justify the assumptions above made in the statement of the issue

and to support the respondent's plea for an affirmance of the judgment of the Supreme Court of Missouri:

(1) *There was no local constitutional restraint against the granting of the exemption.*

It is clear that the Constitution of Missouri in existence at the time the charter was granted imposed no restraint upon the inherent power of the State legislature to grant a tax exemption. This has been expressly ruled by the Supreme Court of Missouri in the *Baumann* case (*supra*, at p. 712):

> "The State Constitution of 1820, in force at that time, imposed no limitations on the legislative power to enact local or special laws, or laws granting exemption from taxation."

Under well-settled principles, this interpretation of its own Constitution by the Missouri Supreme Court may be accepted as conclusive.

(2) *The exemption clause is unambiguous.*

Nor does the instant case present any question respecting the scope or meaning of the exemption clause. Respondent's charter specifically gives it power to hold any real or personal estate "which may conduce to the support of said Seminary or to the promotion of its objects." It furthermore specifically provides that "all property of said corporation shall be exempt from taxation." Since the corporation has specifically been given power to own income-producing property, and since its charter in terms exempts *all* of its property from taxation, the petitioner makes no contention that the exempting clause is limited to property actually occupied for University purposes. Indeed it would be futile to make such

a contention because the Supreme Court of Missouri has settled the matter by the following finding:

> "As to the use of its property, it is obvious from the provisions of the charter and the explicit declarations in the Washington University case, supra, that the University is not limited to real estate actually occupied and directly used for educational purposes. All that is necessary is that the land be used to *support* its educational establishments."
>
> (*Washington University v. Baumann, supra,* at p. 721)

In view of the actual decisions as to the income-producing property of respondent and in view of the express ruling on the point by the Supreme Court of Missouri, we submit that the question of the scope of the exemption is no longer open for consideration. It is, however, interesting to note that while this Court has always adopted a rule of strict construction of tax exemption clauses, the Supreme Court of Missouri has established a more liberal rule. This will appear if reference is made to *State, ex rel. Waller v. Trustees of William Jewell College,* 234 Mo. 299 (1911). The act creating Jewell College exempted from taxation the "lands" then owned by the college and "all the lands that may hereafter be devised or granted to said college." At that time real estate formed the only endowment of the college. Thereafter some of the endowment fund was invested in personalty and the question was whether the exemption was or was not limited to land. The Missouri Court held that the word "lands" was the equivalent of "property" and included the personal property held by the college in its endowment fund. The Court there said (at p. 308):

"The courts have never been over-anxious to apply the rule so as to impose burdens upon religious, scientific, literary and educational institutions. Strict construction has largely been applied to corporations organized for profit and gain, not to corporations performing a public service."

(3) *There is no showing of abuse of power or of the existence of a local emergency.*

The respondent urges that in the absence of some exceptional or extraordinary situation this Court should reaffirm the contractual character of charters of this type and the inviolability of tax exemptions included in them.

The *Dartmouth College* case established the principle that a charter is a contract within the meaning of the Constitution. In *New Jersey v. Wilson*, 7 Cranch (11 U. S.) 164 (1812) this Court first recognized the power of a State legislature to grant by contract a binding exemption from taxation. That power has been recognized by this Court, without exception, to this day. We believe it is unnecessary to cite cases in support of the proposition. It has recently been recognized in *Macallen Co. v. Mass.*, 279 U. S. 620 (1929). *New Jersey v. Wilson* was last cited with approval in *United States v. Bekins, et al.*, 304 U. S. 27, 52 (1938). Two outstanding cases upholding the validity of tax-exemption clauses in charters of charitable and educational institutions are *University v. People*, 99 U. S. 309 (1878), a case involving Northwestern University; and *Asylum v. New Orleans*, 105 U. S. 362 (1881).

While the petitioner is not, in so many words, asking this Court to overrule *Dartmouth College v. Woodward*, he is urging that there is something so exceptional in this particular charter that the Court should not apply to it the well-settled rule.

There is obviously nothing unusual in the character of the charter or in the nature of the educational activity which it contemplates. The charter was granted at a time when the State welcomed the establishment of private institutions of learning as valuable adjuncts to a system of public instruction which had not yet attained its full stature. Had there been no grant of tax exemption the legislature might have been indifferent to the type of educational activity in which the institution was to engage. Since, however, the tax exemption was in the nature of an annual appropriation of public funds in aid of the enterprise it was deemed proper to stipulate that the instruction given should not be "sectarian, religious or political". Thus the State safeguarded its grant and made its contribution to an institution engaged in the very activity which all the States of the Union have always been active in promoting.

Nor is there any feature of the charter which takes it out of the category of grants made upon sufficient consideration. There was the usual acceptance of the charter by those to whom it was tendered and the usual outpouring of generous gifts made to effectuate what the State had approved. Indeed there is reason to believe, as indicated in the *Baumann* case, that the exemption was in fact relied upon by certain large benefactors as an inducement to do their share.

There being nothing unusual in the charter and the consideration for the grant being evident, the petitioner has no alternative but to attack the inviolability of a perpetual tax-exemption—as such; and this he does on the double ground that the granting of tax exemptions is liable to abuse and that it is objectionable as involving a surrender of sovereignty. This (as to the second ground) is to revive the contention so forcibly made by Mr. Justice Miller

in his dissenting opinion in the *Rouse* case—a contention then rejected by the majority and since silently ignored in the many cases in which exemptions have been upheld.

Petitioner in effect insists that this Court should now abandon this long-settled policy. He asserts broadly that the taxing power is the most basic power of government and that, if such exemptions are recognized, "a transient legislature may destroy the foundation upon which an ordered society must depend." We submit that such generalizations do not meet the problem realistically. We recognize, of course, that taxation is a basic power of government. We also recognize that the power of a legislature to bind succeeding legislatures in the realm of taxation is not without limit. But situations justifying a relaxation of constitutional guaranties must actually exist before legal rights can be affected. It is almost naive to imagine that mere assertion is a subsfitute for reality. That no such situation has existed or is likely to exist in Missouri is a necessary inference from the following significant utterance of the very court whose judgment is hereunder attacked:—

> "Now with this situation let us take up the exemption statute in question. Starting with the proposition that the State was limiting the use of the property to be acquired by the corporation to a much-needed and public use, what means this exemption statute? We say much-needed use, because we cannot blind our eyes to the public history of our State. Of such things courts take judicial cognizance. We should never lose sight of the fact that by this Act of 1849, the State was licensing the twenty-six men and their successors to solicit and receive property of all kinds (not lands alone) from charitably disposed people, but in the interest of the State was impounding every cent of it

for a public purpose. It costs to run public schools, and in those days the State was not situate as it is now. But even now, were it not for the great institutions of learning founded, as was this defendant, it would require at the hands of the State twice its present outlay for higher education. If a reason for the fixed public policy of those days be required, herein we have it." (*State ex rel. v. Trustees of William Jewell College, supra*, p. 316.)

This leaves only the bare proposition that the power of taxation can never be surrendered to any extent because it is inherent in sovereignty. This proposition sometimes has been advanced but never accepted. On the other hand, it has been as eloquently proclaimed that the granting of a tax-exemption is in itself an exercise of sovereignty. It seems to us that neither of these propositions meets the problem head-on. Every legislature is sovereign in its own sphere and every act of a legislature is an exercise of sovereignty. But it is conceded that the contract clause applies to the contracts of States. If this is so, then every contract of a State is a self-imposed limitation on sovereignty as respects the matters contained in the contract. The real question therefore is not whether the State can bargain away its sovereign power but whether the particular bargain satisfies our concepts of an enforceable contract.

Petitioner urges that the principle subjecting contracts to legislative impairment in the exercise of the police power and the power of eminent domain logically should have full application to contracts granting tax exemptions. We do not believe this analogy is well taken. It is true, as petitioner states, that all three powers are inherent powers of sovereignty. On the other hand, there does exist

a distinction which separates the tax power from the other two in so far as the contract clause is concerned. The police power, generally speaking, comprehends the enactment of legislation to promote the order, safety, health, morals and general welfare of society. The power of eminent domain may be defined as the right of the State to resume dominion over property in the public interest, or the taking of property for public use. It is settled, and with sound reason, that the State legislatures cannot surrender by contract the right to exercise these powers. This principle is based upon the theory that the sanctity of contracts is subordinate to the general welfare of the people and cannot operate to stay the legislative hand in the enactment of measures designed to promote their health, safety and morals. This principle does not have unrestrained application in the field of taxation. Taxation is the imposition of burdens or charges upon persons or property to raise money for public purposes. Taxes are in payment for the service and protection which the government affords the taxpayer and his property. It has been recognized that the power to exempt from taxation, like the power to tax, is an attribute of sovereignty. This is because public policy motivates the award of exemptions where they forward a public interest, such as the creation, maintenance and support of educational, charitable and religious institutions. In such cases, the property being devoted to a public service, there is excellent reason to relieve it of the burden of taxation although the general welfare of all the people requires that it remain subject to proper exercises of police power and the power of eminent domain. Since the people are receiving equal and frequently greater value as compared to the amount of the

exemption, their interests are fully subserved and there is no ground for complaint. This is precisely why irrevocable tax exemptions, based upon valid and adequate consideration, have been held to be entitled to protection from impairment under the contract clause of the Constitution. The instant exemption, being based upon fair and just consideration, is entitled to such protection.

If there is no pressing public reason why respondent's property should be subjected to taxation, is there any reason why the particular contract should not be recognized and enforced? We submit that this question should be answered in the negative. Education is one of the main objectives of any government. It is specifically stated in the Missouri Constitution of 1865, and again in the present Missouri Constitution of 1875, that education is essential to the preservation of the rights and liberties of the citizens of that State. (See opinion below, R. 178.) Respondent is making its contribution to the attainment of that objective. If by a tax-exemption clause the legislature secures the foundation of an educational institution, then it cannot be said that the State is not receiving adequate consideration for the promise. It is true that by granting the exemption the State is relinquishing its right to secure revenues from the properties of the institution. But such an institution is supplying for some of the citizens of the State what the State itself is in some fashion bound to supply. When, therefore, the State gives up its right to tax to such a limited degree, it cannot be said with conviction that it is surrendering enough to place the State in peril or even to prejudice the public welfare, since the people are receiving, through the functioning of the institution, a benefit proportioned to the value of the grant.

Petitioner does not and cannot deny the great value of the public service which respondent renders to the people of Missouri. Nor does petitioner attempt to portray respondent as an extravagant and non-essential institution which might be abandoned without injury to the public interest. The suggestion is made that if the tax-exemption clause remains in effect respondent will somehow in the future go on increasing the number of its tax-exempt properties without limit. We venture to suggest that no serious attention should be given to this argument. It presents one of those fanciful fears which have no basis in reality. As long as exempted properties are properly devoted to educational purposes or to the support of an educational institution, a corresponding benefit results. If respondent should, by any chance, acquire more property than it needs for educational purposes, or should it misuse that property, or violate the restrictions in the charter, then, as pointed out in the *Baumann* case, the State would have full authority to call upon respondent to account in direct proceedings against the corporation. The existence of this power is in itself an effective protection against the supposed evils conjured up by the petitioner.

It must steadily be borne in mind that respondent's objectives have no tinge of selfishness. It is not a corporation organized for profit. It is not seeking to take money from the people of Missouri without bearing its share of the burdens of government. Instead it is performing a necessary governmental function. If, for such performance, the legislature pays the price of tax exemption, we fail to see how such a contract can be condemned as inconsistent with public policy. We submit that the answer can best be summarized by the following quotation from the opinion of the Court below:

"Being of this mind it is not necessary to discuss other points raised by appellants about the wisdom of granting such a charter. In many instances the power to do so was abused so that it has since been abolished or cautiously guarded. But under the protection of the Federal Constitution even grants which turned out to be improvident are beyond the reach of the State. In this instance however it cannot be said that the grant was improvident. When it was made the constitution provided that 'schools and means of education shall forever be encouraged.' Const. 1820, Art. VI, Sec. 1. The Legislature properly deemed the purposes for which the University was organized to be beneficial to the people. Here were a group of public-spirited and unselfish men generously seeking to establish an educational institution at private expense which to some extent would relieve the State in that field. Laws for the creation of a university supported by the State had been adopted only fourteen years before. It was the burdensome obligations on the State arising 'from a false and ruinous (fol. 180) system of loaning its credit to corporations by which it incurred an immense debt' and from the conditions following the civil war all calling for exceedingly onerous taxation which brought about the all-inclusive change of policy through the restrictions in the 1865 Constitution. 42 Mo. l. c. 326. At the same time the principle that education was essential to the preservation of our rights and liberties was reasserted (Const. 1865, Art. IX) and it was again later in the Constitution of 1875 (Art. XI). Verily the same is true today." (R. 178.)

Brief reference may be made at this point to the contention that the amendment of respondent's charter had the effect of removing its exemption from taxation. This contention is unsound. The amendment expressly pro-

vided that "The said corporation shall have, hold and enjoy all the property, rights, franchises, endowments, immunities and privileges conferred upon and belonging to The Eliot Seminary." (R. 5.) The word "immunities" expressly preserves the tax-exemption. Furthermore, the amendment was made in 1857, and so before the Constitution of 1865. The cases cited by petitioner (Petitioner's brief, p. 28) are not applicable. They involve situations either where the amendment contained no saving clause, or where the corporation accepted a grant of new privileges after a change in the Constitution, and so was deemed to have accepted those privileges subject to the Constitution then in existence.

In view of these considerations the respondent would urge the Court to accord it constitutional protection even if in order to do this it were necessary to differ from the Supreme Court of Missouri. In fact, however, the respondent is pleading for an affirmance of the judgment of that Court and is not aware of any rule of Missouri law inconsistent with such affirmance.

The petitioner would have this Court believe that its decision in the *Rouse* case is inconsistent with the settled law of Missouri. This statement deserves critical examination. It is based upon two decisions—*City of St. Joseph v. Hannibal and St. Joseph R. R. Co.*, 39 Mo. 476 (1867) and *Washington University v. Rowse*, 42 Mo. 308 (1868), the decision from which the original appeal was taken by respondent to this Court. In the *St. Joseph* case the City levied a tax against certain real estate owned by a railroad and situated within the corporate limits of the City. The charter of the railroad provided that the stock of the company should be exempt from all State and county taxes, and it had previously been decided that this provi-

sion exempted the property of the company itself from state and county taxation, since the property was represented by the stock. The railroad contended that the exemption was broad enough to cover not only the taxes specified in the charter but also taxes levied by the City. This contention was rejected by the Supreme Court of Missouri. In the course of its opinion the Court stated (page 479):

> "There can be no doubt of the power of the legislature to repeal a temporary rate of taxation, and impose another and higher rate, or additional taxes, by virtue of the State sovereignty over the whole subject of taxation, *unless there has been some express contract in limitation of the power upon a consideration deemed to be a part of the value of the grant of a charter.*" (Italics ours.)

This case, therefore, by no means supports the proposition that the *Rouse* decision by this Court was opposed to the then settled law of Missouri. The *St. Joseph* case merely stands for the familiar proposition that an exemption ought not by construction to be extended indefinitely beyond its express terms. The case does not decide that a charter is not a contract or that the legislature lacks the inherent power to bind the State by the promise of tax exemption. On the contrary, as will be seen from the above quotation, it expressly recognizes the principle that the legislature may bind the State not to impose additional taxes if by a promise based upon a consideration it has expressly limited its own taxing power.

Nor does the decision of the same Court in the *Rouse* case support petitioner's proposition. The Missouri court did not hold that the legislature could not, under any cir-

cumstances, grant an irrepealable tax exemption. On the contrary the court said (page 323):

> "Therefore one Legislature cannot pass a law irrevocable or irrepealable in its character unless it has imparted to it something in the nature of a compact or contract which will preserve it inviolate under the inhibition of the national constitution. A law which seeks to deprive the Legislature of this inherent and vital principle of sovereignty—the power of taxation—must be so clear, explicit, and determinate, that there can be neither doubt nor controversy about its terms or the consideration which renders it binding."

Thus the Missouri Court in the *Rouse* case again recognized that a tax exemption is binding if contained in a contract based on a consideration. The weakness which the State Court imputed to the tax exemption claimed by the respondent was absence of consideration for the legislative promise. That this imputation was erroneous was the point on which this Court reversed the State Court. The charter of respondent was like any other charter granted to the incorporators of an institution of learning or of a charity. True it contained no express statement of a consideration. But in all such cases the grant is treated as an open offer which, if accepted by the incorporators and later acted upon, becomes a contract by offer and acceptance. This, in last analysis, is the basis of the decision in *Dartmouth College v. Woodward*, 4 Wheat. 518 (1819); and while the State Court paid lip-service to that classic, what it did in effect was to reject the doctrine which this Court had therein established as a fundamental principle of American law. When, in the *Rouse* case, this Court reversed the judgment of the State Court, it did so because the *Dartmouth College* decision was recognized as con-

trolling. In so deciding this Court said (see *Home of the Friendless v. Rouse, supra*, at p. 436):

> "It is observed that there is no consideration stated in the act for the release from taxation, which it is claimed is necessary in order to uphold the contract. But this is a mistake in view of the law on this subject.
>
> "There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the consideration for the contract, and no other is required to support it. This has been the well-settled doctrine of this court on this subject since the case of *Dartmouth College v. Woodward*."

Since the acceptance of the grant contained in the charter constituted a contract and since the tax exemption was clear, the institution was granted relief from the tax.

It is accordingly submitted that the petitioner has wholly failed to show that there was any "settled law" in Missouri denying to charters such as this the quality of a contract. Until the *Rouse* decision the founders of the University were justified in believing that the *Dartmouth College* case was the law and that their contract would be respected. If there were any law to the contrary in Missouri, it is to be found only in the *Rouse* case itself; and we submit that on appeal this Court, even on the petitioner's theory, was fully justified in rejecting that single decision and in making its own determination as to the validity of the contract.

Just as there was no Missouri law to the contrary prior to the *Rouse* decision, so it cannot be said that there

has since been any intimation that the Missouri Court, if left free to follow its own independent judgment, would not treat respondent's charter as a contract.

That Court has consistently recognized that the charter of corporations for profit *is* a contract and that a tax exemption clause will be upheld as a part of it: *Sloan v. Pacific R. R. Co.*, 61 Mo. 24 (1875); *Scotland County v. Missouri, Iowa & Nebraska Ry. Co.*, 65 Mo. 123 (1877); *Mechanics' Bank v. City of Kansas*, 73 Mo. 555 (1881); *State, ex rel. Trammel v. Hannibal & St. Joseph R. R. Co.*, 101 Mo. 136, 13 S. W. 505 (1890). In *State ex rel. Haeusser v. Dreer*, 78 Mo. 188 (1883) we find the Court asserting that the doctrine of the *Dartmouth College* case "has been adopted by this and the courts of most, if not all the states, of the Union."

The Supreme Court of Missouri has just as consistently applied this doctrine to the charters of charitable and educational institutions; and has recognized the validity of tax exemption clauses in such charters: *President, etc. of St. Vincent's College v. Schaefer*, 104 Mo. 261, 16 S. W. 395 (1891); *State ex rel. Dosenbach v. St. Joseph's Convent of Mercy*, 116 Mo. 575, 22 S. W. 811 (1893); *State ex rel. Morris v. Board of Trustees of Westminster College*, 175 Mo. 52, 74 S. W. 990 (1903); *State ex rel. Waller v. Trustees of William Jewell College, supra.*

As noted above, it was stated in the case last cited that, whereas statutes exempting property from taxation should be strictly construed, the courts in Missouri have never been overanxious to apply that rule so as to impose burdens upon religious, educational or other charitable institutions. In view of this rule of construction and in view of the fact that such charters have been continuously treated as binding contracts by the courts of Missouri for

the past seventy years, we submit that the doctrine advocated by the petitioner is not the law of Missouri today; and that the conception of a charter as a contract is now as much a part of the law of that State as it is a part of the law of this Court.

Upon the whole, therefore, the respondent submits that its charter, including the exemption clause, is a contract which is entitled to constitutional protection and suggests that an affirmance of the judgment below will both accomplish this result and also be in harmony with the law of the State.

Respectfully submitted,

GEORGE WHARTON PEPPER.
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In the

Supreme Court of the United States

No. 711.

H. J. GORMAN, City Treasurer of Kansas City, Missouri, and FRANK McCABE, City Assessor of Kansas City, Missouri, *Petitioners*,

vs.

THE WASHINGTON UNIVERSITY, *Respondent*.

PETITION FOR REHEARING.

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THE WASHINGTON UNIVERSITY, *Respondent.*

PETITION FOR REHEARING.

Come now petitioners and respectfully petition this Court to grant them a rehearing in the above entitled cause, and in support thereof, state:

In deciding that petitioners had a right, under Section 4 of the 1890 Amendments to Article 6 of the Constitution of Missouri, to move for a transfer to the Missouri Supreme Court sitting *en banc*, this Court failed to give consideration to the construction placed by the Missouri Supreme Court

on said section. Under this construction it is our firm opinion that there existed no legal grounds for such a motion. It would seem that this opinion was shared by counsel for respondents inasmuch as they did not raise this jurisdictional point at any time in these proceedings.

In the case of *McAllister* v. *Terminal Railway Co.*, 324 Mo. 1005, l. c. 1020, the Missouri Supreme Court said:

> "Cases arising under the Constitution of the United States, acts of Congress, or treaties, and involving their interpretation and application, and of which jurisdiction is given to the Federal Courts, are commonly described by the legal profession as cases involving a 'Federal question.' (Black's Law Dictionary; *In re Sievers*, 91 Fed. 366, 372; *Williams* v. *Bruffy*, 102 U. S. 248, 20 L. Ed. 135). If the above reference to a Federal question had occurred without synonymous or qualifying terms in Article VI of the Constitution as originally adopted, it might be given this broad interpretation. However, appearing as it does in an amendment to Article VI and adopted some fifteen years thereafter we think the words 'when a federal question is involved' should be interpreted according to the standard originally indicated and still set forth in Article VI. Section 12 of that article fixes our jurisdiction, and the only Federal questions there mentioned are those 'involving the construction of the Constitution of the United States,' or where 'the validity of a treaty or statute of or authority exercised under the United States is drawn in question.'"

This doctrine was reaffirmed in the case of *Huckleberry* v. *Missouri Pacific Railroad Co.*, 324 Mo. 1025, l. c. 1042, wherein the court said:

> "The question here raised involves the interpretation and application and not 'the validity' of the statute or authority exercised under the United States. Under our ruling in *Florence McAllister, Administratrix of the*

Estate of William McAllister, v. *St. Louis Merchants' Bridge Terminal Railway Company*, *ante*, p. 1005, 25 S. W. (2d) 791, this is not a proper ground for transfer to Court *en Banc*. The motion to transfer is denied."

II.

Finality of Divisional Opinion.

Likewise, this Court failed to take into consideration the law of this state as announced in the decisions of the Missouri Supreme Court with respect to constitutional questions regarded as settled. Frivolous and no longer debatable are constitutional contentions that have been previously determined, and the supreme court has consistently refused to consider them. Where the appeal should have been lodged in a Court of Appeals, save for the alleged constitutional question, the case will be transferred to that court.

In the case of *First National Bank* v. *Missouri Glass Co.*, 147 S. W. 1030, where appellant contended that certain state statutes were contrary to the Federal Commerce Act and to the 14th Amendment to the Constitution of the United States, the Missouri Supreme Court said:

> "This was not an open question when the present appeal was taken. If we take cognizance of this appeal, we should simply have to reiterate our former decisions that the statute of this state regulating trusts do not offend either the Constitution of the state or of the United States, but are valid and wholesome exercises of the police power inherent in every sovereign state to protect its citizenry. Where constitutional contentions are no longer debatable, this court will treat their reassertion as frivolous, and will not permit it to dislodge the otherwise rightful jurisdiction of the Court of Appeals. *State* v. *Campbell*, 214 Mo. 362; *Dickey* v. *Holmes*, 208 Mo. 664."

Following are a few of the many cases declaring the same doctrine:

> *State* v. *Swift & Co.*, 207 Mo. 695;
> *Portwright* v. *R. R.*, 183 Mo. 72;

Schmidt v. *Sup. Ct. U. O. F.*, 259 Mo. 491;
State v. *Everetz*, 190 S. W. 287.

Where the constitutional question was open at the time of appeal (which would give jurisdiction to the Supreme Court) but which constitutional question had been decided before submission, in some other case, the constitutional question will be ignored and only the merits considered. This was the procedure adopted in:

Tandy v. *Railway*, 178 Mo. 240;

Lee v. *Jones*, 181 Mo. 291, wherein the court said: "A constitutional question once settled is no longer a constitutional question in this state."

Non-Royalty Shoe Co. v. *Phoenix Assur. Co.*, 277 Mo. 399.

The last mentioned case reached the Supreme Court by certification of the Court of Appeals and not by direct appeal.

Under these decisions the continuing validity of the legislative enactment conferring charter rights upon respondent University was no longer an open question in this state; neither was the validity of the authority exercised under the United States as expressed in *Washington University* v. *Rowse*, 75 U. S. 439, an open question. This for the reason that in the case of *Washington University* v. *Baumann*, 341 Mo. 708, which, upon appeal from the judgment of the trial court, was sent directly to the Court *en banc*, our Supreme Court sustained the enactment, held the Rowse case to be decisive and declared the charter to be a valid contract between the University and the State. More than that, in the case at bar the Missouri Supreme Court reasserted its adherence to the doctrine of the Baumann case and again declared

its obligation to follow *University* v. *Rowse*, 75 U. S. 439, which it held to be "commandingly decisive" of this question. It would seem that there could be no more convincing evidence that the Missouri Supreme Court regarded these questions as finally settled, and under the doctrine of the above cited cases, not a proper subject for transfer to the Court *en banc*.

But because the Missouri Supreme Court regarded these constitutional questions as settled did not foreclose petitioners from laying a foundation for a review by this court. This they did by raising a new question, which the Missouri Supreme Court in its opinion (R. 175), put thus:

> "Appellants principal contention is that the question whether the University's charter constitutes a contract with the state is again open for determination because of the ruling of *Erie Railroad Co.* v. *Thompkins*, 304 U. S. 64."

Such a question as well as the questions raised by respondent necessarily lodged petitioners' appeal in the Supreme Court, which appeal under the doctrine of the cases cited, *supra*, could have been dismissed had the court seen fit, and might have been dismissed had not petitioners invoked the rule announced in the *Erie Railroad* case. Division 1 of the Missouri Supreme Court, where the case was set, ruled adversely to petitioners, but after that ruling, under the decisions, *supra*, they could go no further. Why? First, to repeat, the constitutional questions raised were no longer debatable questions in Missouri and any attempt to transfer to *banc* would be regarded as frivolous. Second, because petitioner's reliance upon the Erie Railroad case raised no federal question within the definition of the McAllister and Huckelberry cases, *supra*, entitling them to move for a transfer to the court in *banc*—it involved no construction of the Constitu-

tion of the United States, drew in question the validity of no federal treaty or statute, challenged the validity of no authority exercised under the United States. On the contrary petitioners, by invoking the doctrine of the Erie case, asserted a right under an authority exercised under the United States (*Pittsburgh, etc.* v. *Loan & Trust Co.*, 172 U. S. 507), and brought themselves within the provisions of paragraph B., Section 237 of the Judicial Code.

It might be asked: If the constitutional questions presented to the Missouri Supreme Court in this case were no longer debatable why did that court again pass upon them? This we can only conjecture. Possibly because petitioners' contentions with reference to the Erie Railroad case were regarded as so interrelated that a decision of them necessarily involved a reiteration of the previous decision of the constitutional question. Or possibly because the constitutional contentions of respondent University were in harmony with the prior decision and the court deemed it not inappropriate to reaffirm what it had previously held in the Baumann case.

Once before, in *Curtice* v. *Schmidt*, 202 Mo. 703 (the only departure we have found from the established law) the Supreme Court, having ordered by mandamus a transfer from the Court of Appeals, considered a constitutional question that had previously been decided. But in that case also, the contention was in harmony with the previous ruling—a charter provision twice held to be invalid was again assailed as invalid. But if the charter provision had previously been held valid, would the court again have considered the contention of invalidity? We find no such instance in the decisions of our Supreme Court. Why then should it be said that the Supreme Court, in disregard of the established law, in the very teeth of a *banc* decision upholding respondent's charter, might have reconsidered on motion for rehearing,

petitioners' repetitious contention that the charter was invalid?

On the contrary, by the Missouri Supreme Court's unqualified endorsement of the Baumann case, by its unequivocable adherence to the Rowse case it, in effect, reasserted that the constitutional contentions decided were no longer open to question, and that a motion urging further consideration would, under the well settled law as announced by that court, be deemed frivolous.

The finality of the divisional opinion is emphasized by the concluding clause of Section 4 of the 1890 Amendments to the Missouri Constitution.

> "* * *; or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision."

Power is thus given a division of the Supreme Court of Missouri, of its own motion, to transfer to *banc* for any cause and it must be conceded that if the court believed that the constitutional questions had not been settled and that petitioners reliance on the Erie case presented a federal question within the definition of the *McAllister* case, it would have transferred the cause to *banc* even though no motion was filed. We submit that petitioners should not be penalized by having their case dismissed in this Court for not having pursued a course so obviously futile and which the Supreme Court of Missouri has so consistently disapproved.

III.

Cases Cited by This Court Distinguished.

We respectfully submit that an examination of each of the cases cited in this Court's opinion as authority for its order of dismissal of the writ of certiorari granted herein, discloses that in each case a situation was presented wherein the petitioner failed to avail himself of a clear right either to an appeal or to petition for an appeal and where either the granting of an appeal was mandatory or the determination of such petition was clearly open to the discretion of the Court to grant or deny. On the other hand, it is the law of Missouri that where constitutional questions have been settled by a prior decision of the Supreme Court they are no longer debatable, and the Court will refuse to consider them. Under that law petitioners had no right to a transfer of the cause to the Court in *banc* and the filing of a motion to that end would have been frivolous.

Conclusion.

In conclusion we respectfully submit that the law does not require the doing of a useless and futile act. As we understand the decisions of our Supreme Court there was no legal basis for a motion by petitioners to transfer this cause to the Court *en banc*. To have filed a motion for such transfer would, under these authorities, have constituted a mere frivolous act. A transfer could not have been had *upon petitioners' motion*, either as a matter of right or, indeed, within the discretion of said Court, for the reason that the Court by its uniform decisions has not only foreclosed itself from exercising such discretion, but has declared that where a constitutional question has been settled such a question no longer exists in this state. If the Court had any discretion with reference to a transfer of this cause to the Court *en banc*, it was a discretion to make such transfer only upon *its own motion* and this the Court failed to do. Thus the divisional opinion in this case was a decision of the highest court of the state to which these petitioners could appeal.

WHEREFORE, Petitioners respectfully pray this Court to grant them a rehearing in this cause.

WM. E. KEMP,
City Counselor of Kansas City, Mo.,
ARTHUR R. WOLFE,
JOHN J. COSGROVE,
Assistant City Counselors,
Attorneys for Petitioners.

Certificate.

Wm. E. Kemp, Attorney of Record for Petitioners, hereby certifies that this petition for rehearing is presented to this Honorable Court not for the purpose of delay, but in good faith, because counsel sincerely believes that the grounds stated in said petition for rehearing are meritorious.

WM. E. KEMP,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 711.—October Term, 1941.

H. J. Gorman, City Treasurer of Kansas City, Missouri, and Frank McCabe, City Assessor of Kansas City, Missouri, Petitioners,
vs.
The Washington University.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

[April 27, 1942.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Respondent brought this suit in the Circuit Court of Jackson County, Missouri, to restrain the assessment and collection of a tax upon its real estate. The validity of the provisions of the state constitution and statutes under which the tax was laid was assailed on the ground that they violate the tax-exemption provision of respondent's charter and therefore conflict with the contract clause of the Constitution, Article I, § 10. The Supreme Court of Missouri affirmed the judgment of the trial court enjoining collection of the tax. 153 S. W. 2d 35. Both courts held that the Missouri constitution and statutes as applied violate respondent's charter provisions for tax exemption, and infringe the contract clause of the Constitution. Cf. *Washington University* v. *Rouse*, 8 Wall. 439; *Washington University* v. *Baumann*, 341 Mo. 708. We granted a writ of certiorari, 314 U. S. —, to review the constitutional question decided by the state court.

Upon examination of the record it appears that the decision and judgment brought here for review were rendered by Division One of the Supreme Court of Missouri, which consists of four of the seven judges of the court. It does not appear that the judgment thus rendered has been reviewed by the Supreme Court sitting *en banc* or that petitioners have made application, as they could have done under § 4 of the 1890 amendments to Article VI of the state constitution, to transfer the cause to the full court for review. The question thus arises whether we have jurisdiction under

§ 237(b) of the Judicial Code, which restricts our authority to review decisions of state courts to those causes wherein a judgment has been rendered "by the highest court of a state in which a decision could be had".

Section 1 of the 1890 amendments to Article VI of the Missouri constitution provides that the Supreme Court shall consist of seven judges and "shall be divided into two divisions", one of four and the other of three judges. It directs that a division shall sit separately for the hearing and disposition of causes and shall have concurrent jurisdiction of all matters and causes in the Supreme Court, except that Division Two shall have exclusive cognizance of criminal causes, and that the "judgments and decrees of either division, as to causes and matters pending before it, shall have the force and effect of those of the court".

But § 1 also contains a proviso that a cause pending in a division may be transferred to the court as provided in § 4. Section 4 reads as follows:

"When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause, on the application of the losing party, shall be transferred to the court for its decision; . . ."

And Rule 24 of the Rules of the Supreme Court of Missouri authorizes the transfer by motion of a cause pursuant to the provisions of the constitution, "from either division to Court En Banc" "after final disposition of the cause by the division".

Under these provisions Division One of the Supreme Court of Missouri, sitting in the present cause, in which "a federal question is involved", was not the last state court in which a decision of that question could be had. Such a case is one which "after final disposition of the cause by the division" could on petitioners' application be transferred to the full court for review, and the decision and judgment rendered by Division One could be set aside by the court sitting *en banc*. Since the constitution of Missouri has thus provided in this class of cases for review of the judgment of a division, the judgment here of Division One is not that of the "highest court of the state in which a decision could be had" within the meaning of § 237(b) of the Judicial Code.

It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or

certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted. *Fisher* v. *Perkins*, 122 U. S. 522; *McComb* v. *Commissioners*, 91 U. S. 1, 2; *McMaster* v. *Gould*, 276 U. S. 284; *Southern Electric Co.* v. *Stoddard*, 269 U. S. 186; *Stratton* v. *Stratton*, 239 U. S. 55; *Millen* v. *Western Union Beef Co.*, 173 U. S. 116; *Great Western Telegraph Co.* v. *Burnham*, 162 U. S. 339. Hence it is the last state tribunal—here the court *en banc*—to which the cause could be brought for review which is the "highest court of a state in which a decision could be had" within the meaning of the jurisdictional statute, regardless of the particular description or designation which may be applied to it by state statutes.

Upon application to this Court for review of the judgment of a state court it is the petitioner's burden to show affirmatively that we have jurisdiction. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. —. As the record fails to disclose that the judgment, review of which is now sought, is that of the highest court of the state in which a decision could be had, we are without jurisdiction and the writ must be

Dismissed.

A true copy.

Test:

Clerk, Supreme Court, U. S.